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REPORTS

OF

510

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING

June Term, 1857, and January Term, 1858.

BY JOHN W. SHEPHERD,
STATE REPORTER.

40591

XXXI.

MONTGOMERY:
BARRETT & WIMBISH, PRINTERS AND BINDERS.
1859.

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OFFICERS OF THE SUPREME COURT,

DURING THE TIME OF THESE DECISIONS.

HON. SAMUEL F. RICE, CHIEF JUSTICE.
HON. A. J. WALKER, }
HON. GEO. W. STONE, } ASSOCIATE JUSTICES.

M. A. BALDWIN, ATTORNEY GENERAL.
JOHN D. PHELAN, CLERK.
JAMES S. ALBRIGHT, MARSHAL.

TABLE OF CASES.

RULES OF CHANCERY PRACTICE,

ADOPTED BY THE SUPREME COURT OF ALABAMA, AT JANUARY TERM, 1859.

1. Rules numbered 40, 41, 74, 95, and 99, of the Revised Rules of Chancery Practice, adopted at the June term of this court, 1854, are hereby abolished.

2. When amendments are proposed under section 2905 of the Code, or under the third section of the act amendatory of proceedings in chancery, passed by the General Assembly of this State, and approved on the 8th Feb'ry, 1858, the opposite party shall be served with a copy of the proposed amendment, with notice of the time when the application will be made. When the application will be before the Register, under section 2905 of the Code, the notice shall be five days before the hearing of the application, unless waived; when to the Chancellor in vacation, either under that section, or under the said act of 1858, ten days notice shall be given before the hearing of the application, unless waived; but, when the application is made in term time, one day's notice shall be sufficient; and when the motion to amend is made at the hearing in term time, no notice shall be necessary, but the Chancellor may postpone the hearing of the motion as justice may require. Where a defendant is in default for want of an answer, the notice will be sufficient, if entered on the order book of the Register, as directed by section 2912 of the Code, for the number of days required by this rule.

3. Amendments to bills may be made after demurrer and argument thereof, in the same manner as is provided for amendments after answer.

4. When an amendment to a bill is allowed, it shall be considered as introduced into the bill from the time of its allowance.

5. Notice of the allowance of amendments to bills shall be given in the following manner—that is to say:

I. Where the defendants who have answered are actually present in court, either in person or by their solicitors or guardians *ad litem*, at the allowance of the amendment, they shall be deemed to have notice thereof.

II. After the allowance of an amendment to the bill, the complainant shall cause a notice that his bill has been amended to be served upon any defendant who was not in court, either in person, or by his solicitor or guardian *ad litem*, at the allowance thereof; unless the defendant is a non-resident, in which event the court shall direct in what manner he shall be notified.

III. All parties who, at the allowance of an amendment, shall be in default, shall be deemed to have notice thereof, after a notice that the bill has been amended shall have been entered on the order book for such time as the Chancellor or Register may direct.

6. A decree *pro confesso* may be entered upon amendments, against each defendant who fails to answer the same within thirty days after notice thereof, as above provided, unless the matter of the amendment has been denied in some previous answer of such defendant. When the justice of the case requires it, the Chancellor or Register, allowing the amendment, may enlarge the time for answer.

7. No testimony shall be required of the infancy of a party suing or being sued as such; but, before a guardian *ad litem* can be appointed for an infant defendant, an affidavit must be made as to the fact of infancy, and that the infant is believed to be under or over fourteen years of age; or, if the facts are stated in a sworn bill, it will be sufficient without any separate affidavit.

8. Upon the death of a plaintiff, no bill of revivor shall be necessary to revive the suit, unless so directed by the Chancellor; but his personal representatives or heirs, or both, as the case may require, shall be made parties on motion *ex parte*, before the Register in vacation, or the Chan-

cellor in term time. So, upon the death of a defendant, instead of proceeding by bill to revive against his personal representatives or heirs, upon a verbal suggestion to the Register or Chancellor, an *ex-parte* order shall be made for a summons to issue to his personal representatives or heirs, or both, if required, to appear at a day named, and defend in the place of the deceased; and when such summons is served, the suit shall be considered as revived at the expiration of thirty days after service thereof, and be thereafter prosecuted against the new parties, without any order of revivor. When the complainant or defendant is an executor or administrator, and his term of office expires, by death, resignation, or otherwise, a similar course may be taken to make the administrator *de bonis non*, or other representative of the original party in interest, a party to the suit. A legal representative or heir may come in voluntarily, and make himself a party. No process or bill shall be required to bring in the husband of a female defendant, when married pending the suit, but the same shall be prosecuted to a final termination in his absence; or the plaintiff can suggest the marriage, and have an order for a summons against such husband, as in case of a representative of a deceased defendant; or such husband may voluntarily make himself a party. When a plaintiff proceeds by suggestion to bring in a representative or heir, and makes affidavit as required by the 22d Rule of Chancery Practice, publication can be made against such absent heir or representative as required by said rule; and when the time therein specified expires, and such absent heir or representative fails to make himself a party, the Chancellor or Register shall make an order, declaring such person to be a party in lieu of the deceased party; and the cause shall proceed against such absent party, and, if necessary, a decree *pro confesso* be entered against him; or, if the defendant is a minor, a guardian *ad litem* be appointed for him. This rule is not intended to prevent the parties from proceeding by bill of revivor, as directed by rules 96, 97, and 98, of the present rules of practice, or according to the English practice, if they so elect; nor to prevent the

Chancellor from directing the cause to be revived by bill whenever he deems such course proper.

9. Service of notice in relation to any supplemental bill, amendment, decree, motion, or other proceeding in the Chancery Court, on the guardian *ad litem* or next friend of any party, is a sufficient and valid service as to the party represented by such guardian *ad litem* or next friend.

10. These rules shall take effect from and after Monday the 28th day of March, 1859.

AMENDMENT OF RULE FOURTH—ADOPTED AT JAN'Y TERM, 1856.

Ordered by the court, that the 4th Rule of Chancery Practice, adopted at the June term of this court, 1854, be amended, by adding to it the following: "*Provided*, that this rule shall not apply to orders for the issuing of writs of *ne exeat* and equitable attachments, and for the sale of personal property levied on, in the granting of which the Register shall not be restricted to Monday."

RULES OF PRACTICE IN INFERIOR COURTS.

1. *Actions by transferree or endorsee.*—When an action is brought under section 2129 of the Code, by any transferree, assignee, or endorsee, the plaintiff shall not be required to prove his interest in the cause of action, unless the same is put in issue by plea, verified by affidavit. (Adopted at January term, 1853.)

2. *Bills of exceptions.*—The judges of the several courts in which bills of exceptions may by law be taken, may require such bills to be presented for their signature during the trial. If no such requisition be made, then such bills must be presented within five days thereafter, unless the presiding judge shall, in his discretion, give a longer period; but in no case shall a bill be signed after the final adjournment of the court, unless the party tendering it has brought himself within the provisions of section 2358 of the Code. (Adopted at June term, 1853.)

3. *Original papers made part of transcript.*—Whenever it shall, in the opinion of the judge of any circuit or probate court, or of any chancellor, or the judge of the city court of Mobile, be necessary or proper that original papers of any kind should be inspected in the supreme court upon appeal, such judge or chancellor may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper; and such papers will be considered by the supreme court, in connection with the transcript of the proceedings. This rule shall apply as well to cases heretofore tried, as to those which may hereafter be tried. (Adopted at June term, 1856.)

RULES OF PRACTICE IN SUPREME COURT.

RULE 31. *Abatement and revivor of suit.*—When the death of a party has been suggested, and an order made to revive in the name of or against the heirs or personal representative of the deceased, and this is not done by the next term of the court, the suit shall abate. (Adopted at January term, 1854.)

RULE 32. *Briefs.*—The counsel for the appellant, or plaintiff in error, in each case, shall furnish to the court a brief, containing a statement of the points to be decided, and of the facts of the case so far as necessary to show the manner in which these points arise; and the counsel for the appellee, or defendant in error, in like manner, shall furnish a brief setting forth the points of his defense. All briefs must be furnished at least one day before the argument of the cause; and any counsel failing to furnish a brief, as aforesaid, shall not be heard in argument at the bar. Rule 16, on page 711 of the Code of Alabama, and Rule 30, adopted at January term, 1854, are hereby declared to be superseded. (Adopted at January term, 1856.)

REPORTS

OF

CASES ARGUED AND DETERMINED

At June Term, 1857.

WALKER *vs.* FORBES.

[ACTION ON GUARANTY.]

1. *Notice to guarantor of principal debtor's default.*—Where the principal debtor is insolvent at the time the debt falls due, notice of his default is not necessary to charge the guarantor, since the latter can, in such case, sustain no injury from the want of notice.
2. *Opinion of expert in foreign law.*—An attorney of a foreign State may testify to the exposition, interpretation and adjudication of the statute law of that State.
3. *General objection to deposition.*—A general objection to a deposition, on the ground of the irrelevancy and incompetency of the evidence, may be overruled entirely, if any portion of the evidence is admissible.
4. *Conflict of laws as to construction of contract.*—The construction and interpretation of a contract are to be determined by the law of the place where it was made.
5. *Conclusiveness of judicial decisions.*—A decision of the supreme court, construing a contract according to the statute, as set out in the record, of the foreign State in which it was made, is not conclusive on a second appeal, when the testimony of foreign experts, introduced on a second trial after the remandment of the cause, shows that that construction was erroneous.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. MCKINSTRY.

ASSUMPSIT by T. & G. Forbes, against Daniel Walker, on a written guaranty for the "ultimate payment" of goods furnished by plaintiffs to one Cogburn. The former re-

port of the case (see 25 Ala. 139) discloses all the material facts as then presented; and the additional facts adduced on the second trial, after the remandment of the cause, are stated at sufficient length in the opinion of the court.

GEO. N. STEWART, for the appellant.
P. HAMILTON, *contra.*

RICE, C. J.—Under the law of this case as settled when it was formerly here, (25 Ala. 139,) the evidence adduced on the last trial, if believed, was sufficient to establish notice of the acceptance and action upon the guaranty by the plaintiffs; Cogburn's insolvency at the time the debt fell due; that the use of all lawful and proper means to collect the demand of him would have been fruitless; and that the defendant sustained no injury, either by the failure to use such means, or by the failure to give him notice of the default by Cogburn; and therefore, the failure to give him notice of that default did not discharge him.

According to the former decision in this case, it is also settled, that the relation of the parties in respect of the original demand is not affected by the draft taken by the plaintiffs of Cogburn, on the defendant, which he refused to accept, and which was given on account of the bill of goods they furnished to Cogburn upon the guaranty.—See Brown v. Wright, 7 Monroe, 597; Robinson v. Offut, *ib.* 540.

When the case was here before, it appeared that the plaintiffs had read in evidence on the trial sections 3014, 3015 and 3016 of the Civil Code of Louisiana, for the purpose of showing the law of that State in relation to such a guaranty as that upon which this suit was brought, and that the contract of guaranty was consummated in that State. But it did not then appear that any evidence of lawyers, or persons skilled and instructed in the law of that State, was offered or introduced, for the purpose of either giving the interpretation of the written law, or of affording to our courts the means of construing it. Since the cause was remanded by this court, and on the last

trial, evidence of that kind was introduced by the plaintiffs. After the aforesaid sections of the Civil Code had been read in evidence, the depositions of three Louisiana lawyers, of long and extensive practice in that State, regularly taken, were introduced for the purpose of proving "the unwritten law of Louisiana." To the reading of these depositions the defendant objected, on the ground "that they were irrelevant and not competent to prove the law of Louisiana." The objection was overruled, and the defendant excepted; and it is for us to decide, whether there was error in overruling the objection as made.

The contract of guaranty sued on was, as before stated, consummated in Louisiana. The guarantor's liability was materially affected, if not wholly governed, by the law of that State. The question, as to *the language* of the written law of that State upon the subject, was settled by the production of that language itself from the Civil Code. The question which then remained unsettled, was not what was the language of the written law, but what was the law altogether, "as shown by exposition, interpretation, and adjudication." The exposition, interpretation and adjudication may never have been evidenced by books or writings; but may, nevertheless, have become well understood, as the rule of law deduced by the court from the *written words* of the Code, upon a particular state of facts. Upon such a question, the testimony or opinions of competent witnesses, instructed in the law of that State, may be resorted to. "Properly speaking," says Lord Denman, "the nature of such evidence is not to set forth *the contents* of the written law, but its *effect*, and *the state of the law resulting from it.* The mere contents, indeed, might often mislead persons not familiar with the particular system of law. The witness is called upon to state what law does result from the instrument."—DeBode's Case, 8 Q. B. 208; Cocks v. Purday, 2 C. & K. 269; 1 Greenl. Ev. §§ 486–488; 3 Phil. Ev. (ed. of 1839) 1142.

Without saying anything more on this point, we are satisfied, that at least a part of the depositions objected to was admissible evidence; and, as the objection was to

the whole, and part is admissible, there was no error in overruling it.

The evidence of the Louisiana lawyers, having been adduced on the last trial, and having been found to be credible and true, must control the courts of this State, in construing the aforesaid sections of the Civil Code of Louisiana, although it leads to the adoption of a construction different from that placed upon them by the former decision in this case. Our former construction was based upon the mere language of the sections, without any evidence as to the meaning or construction which had been placed upon them in Louisiana. Evidence of that kind being now before us, we yield our former construction, because we recognize the right of the courts of our sister States to settle authoritatively the meaning and effect of their own statutes, in relation to contracts like that here sued on, made within their limits.—Peake v. Yeldell, 17 Ala. 636; Davidson v. Sharpe, 6 Iredell, 14; Hanrick v. Andrews, 9 Porter's Rep. 9, and the numerous authorities there cited. Our former construction would have been the law of this case, if it had been made upon the evidence now before us; but is not so, because, in this respect, the evidence is materially different from what it was when the case was previously here.

Applying to the case, as now presented, the views above expressed, and the principles settled when the case was formerly here, so far as they are not rendered inapplicable by a material change in the evidence,—we feel bound to hold, that there was no error in any of the rulings of the court below embraced by the assignment of errors.

Judgment affirmed.

LECROY *vs.* WIGGINS.

[ACTION AT LAW FOR BREACH OF SPECIAL CONTRACT.]

1. *Construction of contract, as to rights and liabilities of parties, and measure of damages for breach.*—Plaintiff having built a mill on defendant's land, thereupon the parties entered into a written contract, containing the following stipulations: That plaintiff should "continue to keep the mill in good order, or by performing all the mechanical labor necessary to keep the machinery in good running order," should "receive for his services one third of the toll arising from said mill," and should "have the privilege of ginning his cotton and threshing his grain toll free;" that defendant should "continue to furnish the mill-seat, with all the necessary conveniences and appurtenances thereto, and all materials necessary for putting said machinery in order for running," should "at all times furnish a miller," and should be "entitled to two thirds of the profits;" and that, if either party wished to sell his interest in the mill, he should "give the other the refusal of said interest." *Held*, 1st, that defendant's right to sell the mill-seat, with his interest in the mill, did not depend upon the plaintiff's assent to the sale, but upon his first offering plaintiff an opportunity to purchase it; and, 2d, that the measure of damages, which the plaintiff was entitled to recover on account of an unauthorized sale by the defendant, was not the value of his labor on the mill at the time of the sale, but the value of one third of the toll, with the privilege of ginning his cotton and threshing his grain toll free, less the value of the services necessary on his part to keep the mill and machinery in running order.
2. *Relevancy of evidence to prove consent.*—Where the issue is, whether the plaintiff consented to a sale by defendant of a mill in which they were both interested, evidence showing that his consent was fraudulently procured is irrelevant.
3. *Parol evidence of contract within statute of frauds.*—Parol evidence cannot be received in reference to a contract which the statute of frauds requires should be in writing.
4. *General objection to evidence.*—When evidence is on its face *prima-facie* illegal, a general objection is sufficient to exclude it.

APPEAL from the Circuit Court of Autauga.
Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Hosea Lecroy against John B. Wiggins, to recover damages for the defendant's breach of a written contract which was in these words:

"Articles of agreement between H. Lecroy and John B. Wiggins, 6th November, 1849. Now the above-men-

tioned parties are jointly and equally concerned in a certain mill and gin, as co-partners, to the following effect: Said Lecroy, of the first part, has built upon the premises a grist-mill and gin, and is to continue to keep said mill in good order, or by performing all mechanical labor necessary to keep said machinery in good running order, and shall receive for said services one third of the toll arising from said mill, and is to have the privilege of ginning his cotton, and threshing his grain, toll free. Said Wiggins, of the other part, is to continue to furnish the mill-seat, and all the necessary conveniences and appurtenances thereto, and is also to furnish all materials necessary for putting said machinery in order for running, and is also to keep, or cause to be kept, said mill by furnishing at all times a miller, and is entitled to two thirds of the profits arising from said mill. It is further agreed, that no additional machinery shall be added to said mill-seat, without the consent of both parties; and in case that either party shall wish to sell his interest in said mill, the above-mentioned parties do bind ourselves, jointly and severally, to give the other party the refusal of said interests, and, in the event that they cannot agree, they will refer the matter to disinterested persons to arbitrate."

The complaint set out this contract, and then alleged that, "although the plaintiff has complied with all its provisions on his part, the defendant has failed to comply with the following provisions thereof, to-wit: 1st, that said defendant, wishing to sell his interest in said mill, did not give the plaintiff the refusal of said interest; 2d, that said defendant has not continued to furnish the said mill-seat, and all the necessary conveniences and appurtenances thereto, but, on the contrary, has evicted the plaintiff from said mill; and plaintiff has thereby been deprived of the receipts of one third of the toll received at the said mill, which was worth a large sum, to-wit, the sum of one hundred dollars *per annum;* and also of the privilege of ginning his cotton, and threshing his grain, toll free, which privilege was worth a large sum of money, to-wit, the sum of twenty dollars *per annum*."

The defendant filed six pleas, in substance as follows:

1. That after making the contract set out in the complaint, defendant sold his interest in said mill, with the consent of the plaintiff. 2. That defendant sold his interest in said mill, before the commencement of this suit, to one Thomas, with whom plaintiff afterwards entered into a contract to carry out the stipulations contained in the contract declared on, and released and discharged defendant from the performance of said contract. 3. That plaintiff agreed, in consideration that defendant would sell his interest in said mill to Thomas, to discharge defendant from the further performance of said contract, and to form a contract with said Thomas in reference to said mill; and that defendant accordingly sold out his interest in said mill to Thomas, and, up to the time of said sale, well and truly performed all his part of said contract. 4. That the land, on which said mill was situated, belonged to defendant; and that defendant sold his interest in said land and mill, after having given the refusal of the same to the plaintiff, who failed and refused to purchase it. 5. That defendant well and truly performed all the stipulations of said contract on his part to be performed. 6. That defendant continued to furnish said mill-seat, and the necessary conveniences and appurtenances thereto, and plaintiff continued to receive and have the benefit of the same so long as he desired, until said mill and gin were afterwards, before the commencement of this suit, destroyed by fire.

On the trial, as appears from the bill of exceptions, the plaintiff offered in evidence the contract set out in the complaint, and the defendant's subsequent deed to Thomas, which was dated February 8th, 1853. He further proved, that he kept the mill in good running order, up to the time of the sale to Thomas; and that the mechanical work on the mill, at the time of the sale to Thomas, was worth $550. "Thomas testified, that when he bought from defendant, he assumed no obligation to permit plaintiff to have anything to do with the mill, except at his own pleasure. There was no evidence that defendant offered to plaintiff a refusal of the purchase of his interest

in the premises. There was evidence tending to show that plaintiff desired to trade with defendant for his interest. Defendant offered evidence tending to show that plaintiff knew of the trade for the mill-seat being carried on between defendant and Thomas, and made no objection to it, but said that he was glad of it, as Thomas would furnish better materials if he bought it, and would enable him to build a better mill. Plaintiff offered to prove, that defendant told him, before the trade was made, that if he sold to Thomas, Thomas should execute articles of agreement in his favor, such as existed between him and defendant; but the court sustained an objection to this evidence, and excluded it; to which plaintiff excepted. Plaintiff then offered to prove, that after the sale to Thomas, he went to him with a written instrument," (which is made an exhibit to the bill of exceptions, and which contains stipulations similar to those contained in the contract between plaintiff and defendant,) "and requested Thomas to sign it; and that Thomas refused to sign it. The court sustained an objection to this evidence, and excluded it; to which plaintiff excepted. It was shown that the mill and mill-seat were situated on the land described in defendant's deed to Thomas. The defendant asked said Thomas, what interest he bought when he traded with Wiggins. The plaintiff objected to this question, but the court overruled the objection, and allowed the question to be asked; to which the plaintiff excepted. The witness answered, that he only bought defendant's interest. The plaintiff moved to exclude the answer from the jury, but the court refused to exclude it, and the plaintiff excepted."

"The plaintiff asked the court to instruct the jury, that if they believed from the evidence that plaintiff built the mill; and that his labor on it was worth $550 when it was sold; and that he kept it in good running order while defendant owned it; and that defendant afterwards sold the mill and mill-seat, with no reservation of plaintiff's rights; and that plaintiff knew of said sale, and was only willing that defendant might sell if he could have the same arrangement with Thomas that he had with defendant;

and that Thomas, in fact, had made no such arrangement, and refused to do so,—then the plaintiff was entitled to recover the value of his labor that was on the mill when sold. The court refused to give this charge, and the plaintiff excepted."

In consequence of these adverse rulings of the court, the plaintiff was compelled to take a nonsuit, which he now moves to set aside; assigning for error all the rulings of the court to which, as above stated, exceptions were reserved.

ELMORE & YANCEY, for the appellant.
MORGAN & MARTIN, *contra.*

WALKER, J.—The charge refused by the court asserts, in effect, the following proposition: The plaintiff, having built the mill described in the contract, and discharged the duties devolved upon him by the contract, may recover the value of his labor on the mill at the time of the sale, if the defendant, making no reservation of the plaintiff's rights under the contract, sold the mill to Thomas, and the plaintiff, knowing of the sale, was only willing that defendant should make it, provided he (plaintiff) could have the same arrangement with Thomas which existed between him and the defendant, which arrangement Thomas refused to make. This charge assumes the existence of the contract; and there is no impropriety in the assumption, because an admission of it is implied from the pleadings. The charge makes the defendant's liability result from a sale, when the plaintiff was willing to it only upon a certain condition which did not exist. Whether or not the liability does result from a sale under such circumstances, depends upon the question of plaintiff's right to sell without the consent of the defendant. The contract provides, that either party, wishing to sell "his interest," shall give the other the "refusal of said *interest*, and, in the event they cannot agree, they will refer the matter to disinterested persons to arbitrate." From this clause of the contract we understand, that the parties intended to reserve to themselves respectively a right to

sell their respective "interests," provided the party desiring to sell should first give to the other an opportunity to purchase, at a price upon which they might agree, or, if they could not agree, at a price which might be fixed by disinterested persons, chosen for that purpose. Under this stipulation of the contract, either party might sell, after having discharged his duty in affording the other an opportunity to purchase, of which he did not avail himself. It follows, that the defendant's liability does not result from the mere absence of the plaintiff's consent to the sale, nor from the breach of the condition upon which that consent was given. The proof that the plaintiff consented to the sale only upon the condition that he could make the same arrangement with the defendant's vendee which he previously had with the defendant, and that plaintiff was unable to make that arrangement with such vendee, would be a successful reply to the plea that the plaintiff assented, but not to the other matters of defense.

The charge asked also lays down, as a measure of the recovery, the value of the plaintiff's "labor that was on the mill when sold." The injury to the plaintiff by a sale, when he had been for some time receiving the benefit of the contract, was the value of the rights under the contract of which he was deprived by such sale. We do not think the plaintiff took by the contract an interest in the freehold of the land upon which the mill was situated. His interest was a mere right to such use of the mill, access to it, and occupation of it, during the continuance of the partnership, as were necessary to enable him to discharge the duties imposed, and to receive the benefits provided for him, by the contract. The defendant, who was the owner of the land upon which the mill was situated, had the power, by a sale of the land, to transfer the mill to the ownership of a third person. This sale and consequent transfer would necessarily terminate the partnership. The mill, the entire subject-matter of the partnership, was gone by the sale.—See Collyer on Partnership, 100, § 115; Story on Partnership, 438, § 307. If the partnership was dissolved by the sale of the defendant in violation of his contract, the plaintiff loses all the bene-

fit which he would have derived from the partnership had it continued in pursuance to that contract. That benefit would have consisted in the receipt of one third of the toll, and "the privilege of ginning his cotton and threshing his grain toll free," lessened by the value of the services of the plaintiff which would have been requisite "to keep the mill in good order" and "the machinery in good running order," and estimated upon the supposition that no additional machinery would be added. This is the measure of plaintiff's damages, if he has any right to recover at all. The value of his "labor on the mill" at the time of the sale is not necessarily the same with the value of the benefits and privileges above described; and therefore the charge was properly refused, on account of the incorrect measure of damages laid down in it.

The court did not err in excluding proof of defendant's statement to the plaintiff, that if a sale was made to Thomas, he would make the same agreement with the plaintiff which existed between the parties to this suit. This proof might have been competent under an issue as to whether or not the plaintiff's consent to the sale was fraudulently procured; but such is not the issue here. The defendant pleaded the plaintiff's consent. The record does not show any replication to the plea, or any issue taken on it. We cannot intend that the plaintiff replied to the plea of consent fraud in its procurement. Unless we could aid the appellant, by making through judicial intendment a replication for him, we could not hold the testimony offered relevant.

The defendant asked Thomas, his vendee, when testifying as a witness, "what interest he bought when he traded with the defendant." The witness answered the question, stating that "he only bought the defendant's interest." The plaintiff objected generally to the question and the answer, and excepted to the overruling of the objections. If the evidence in this case had been merely illegal, because there existed written evidence of the same matter, it would have been necessary to have pointed out to the court the objection to it. The evidence was upon its face illegal, without reference to any extrinsic fact,

because it shows the character of a conveyance which the statute of frauds requires to be in writing. The rule is, that parol evidence is not admissible in reference to contracts within the statute of frauds.—4 Phillipps on Ev. (2 part, C. & H.'s notes,) 3 ed., 604, note 297. This evidence being *prima-facie* illegal, it was not necessary to specify the grounds of the objection, and the general objection was sufficient.—Cunningham v. Cochran & Estill, 18 Ala. 478; Davis v. State, 17 Ala. 415.

For the error in the admission of this last named evidence, the judgment of the court below is reversed, and the cause remanded.

MATTHEWS *vs.* ANSLEY.

[MOTION TO QUASH ATTACHMENT.]

1. *English statutes of force in this State.*—English statutes, passed in the reign of Charles II, being enacted subsequent to the settlement of this country, are not part and parcel of our common law.
2. *Difference between judicial and ministerial acts.*—The issue of an original attachment by a clerk is a judicial act, but its levy or service by a proper officer is a ministerial act..
3. *Issue and levy of attachment on Sunday.*—It is irregular to issue an attachment on Sunday, though it may be levied or served on that day; but, if the writ, though actually issued on that day, appears on its face to have been issued on another day, the court cannot direct the clerk to amend the date, and then quash the writ, on motion, on account of the irregularity.

APPEAL from the Circuit Court of Dale.
Tried before the Hon. E. W. PETTUS.

THIS case was commenced by original attachment, sued out on the ground that the defendant absconded to avoid the service of process. At the return term of the writ, the defendant moved to dismiss the levy, and quash the attachment, on the ground that the writ, though pur-

porting on its face to have been issued and levied on Monday, was in fact issued and levied on the preceding Sunday; and, in support of his motion, proved these facts, against the plaintiff's objection, by the testimony of the clerk and sheriff by whom the writ was issued and levied. The court directed those officers, respectively, to amend the date and return of the writ, so as to make it speak the truth, and then granted the defendant's motion to quash. The plaintiff excepted to each of these rulings of the court, which he now assigns as error.

Pugh & Bullock, for the appellant.—1. The court erred in allowing the sheriff to impeach his own return, and directing him, *ex mero motu*, to amend his return.—Doe *d.* Van Campen v. Snyder, 3 How. (Miss.) 66; P. & M. Bank v. Walker, 3 Sm. & Mar. 421; Shotwell v. Hamblin, 23 Miss. 156. If the defendant was injured by the false return, he had his remedy against the sheriff and his sureties.

2. The same principle applies to the clerk who issued the writ, and to the action of the court in allowing him to testify that it was not issued on the day of its date, and in directing him to amend it.

3. There is no law in this State prohibiting the issue or levy of a writ on Sunday. The act of 1803, prohibiting the service of process on Sunday, has not been carried into the Code. At common law, although Sunday was *dies non juridicus* so far as judicial proceedings were concerned, ministerial acts might lawfully be done on that day.—Mackally's case, 5 Co. Rep. 66; Cro. Jac. 279; 2 Bull. 72; Wilson v. Tucker, 1 Salkeld, 78, note *a;* Drury v. DeFontaine, 1 Taunton, 130; Lyon v. Strong, 6 Vermont, 219; Shippey v. Eastwood, 9 Ala. 198. The statute 29th Charles II, ch. 7, prohibiting the service of process on Sunday, having been enacted subsequent to the settlement of this country, is not of force in this State.—Carter and Wife v. Balfour's Adm'r, 19 Ala. 829. That the issue of an attachment is a purely ministerial act, see Kyle v. Evans, 3 Ala. 481.

MARTIN, BALDWIN & SAYRE, *contra*.—1. No reason is perceived why the sheriff and clerk were not competent witnesses, on a motion to quash the attachment, to prove that the date of its issue and levy, as appeared on its face, was incorrect in point of fact.

2. The attachment was void, because issued and levied on Sunday. Although the act of 1803 is not, in terms, incorporated in the Code, other provisions are there found which clearly show that Sunday is to be considered, as at common law, *dies non juridicus*. By section 13, Sunday is excluded in the computation of time; by section 1571, contracts made on Sunday are declared void; and section 3302 denounces punishment against those who compel their servants or apprentices to perform labor on that day. At common law, independently of statutory provisions, Sunday was *dies non juridicus*, and all judicial proceedings had on it were void.—Haynes v. Sledge, 2 Porter, 530; Sorrelle v. Craig, 9 Ala. 541; Story v. Elliott, 8 Cowen, 30. The issue of an attachment is a judicial act.—*Ex parte* Gist, 26 Ala. 161.

STONE, J.—By the provisions of our territorial statute of 1803, (Clay's Digest, 593,) service of process on Sunday was, in very comprehensive terms, prohibited. In Cotton v. Huey & Co., 4 Ala. 56, this statute was construed by this court; and it was there held, that the process of attachment was embraced in its provisions.

This provision of the act of 1803 is not incorporated into the Code, and we have found no provision of similar import. The only sections which seems to be designed to prohibit worldly employment on the Christian Sabbath, are those numbered 1571, 3302, and 3303. These sections do not bear on the question under consideration.

The doctrine, that English statutes, enacted before the settlement of this country by our ancestors, are part and parcel of the common law, cannot, in any way, affect this question. The earliest statute on this subject was during the reign of Charles II, subsequent to the settlement of this country; and, under the above rule, it exerts no binding force on us.—See Carter v. Balfour, 19 Ala. 829.

We must, then, resort to the common law, for the rules which must settle the questions raised on this record. It is laid down in books of the highest authority, that, at common law, the Christian Sabbath was *dies non juridicus;* and that no judicial proceeding could be had on that day. It was declared, with equal clearness, that acts purely ministerial might legally be performed on that day.—Mackally's case, 9 Rep. 66; S. C., Cro. Jac. 279; Wilson v. Tucker, 1 Salk. 78; Drury v. DeFontaine, 1 Taunton, 135; Lyon v. Strong, 6 Vermont, 219; Story v. Elliott, 8 Cowen, 27. See, also, Shippey v. Eastwood, 9 Ala. 198; Hooper v. Edwards, 18 Ala. 280; Sayles v. Smith, 12 Wend. 57.

The service of the process of attachment is a purely ministerial act; and not being within the provisions of any section of the Code, it follows, that no valid objection can be urged to its execution on the Sabbath day. The issue of the attachment was in its nature judicial. It was not one of the functions of the clerk of the court, *as clerk;*—but was a power conferred on him by the statute. Attachments issued by him were not necessarily returnable to the court of which he was clerk. Hence, in the issue of the attachment in this case, the clerk cannot, with any propriety, be called the ministerial officer of the court.—*Ex parte* Gist, 26 Ala. 156; Stevenson v. O'Hara, 27 Ala. 362; Matthews, Finley & Co. v. Sands & Co., 29 Ala. 136.

It results from the above well-ascertained principles of law, that the issue of the attachment on Sunday was irregular; and, if that fact had appeared on its face, the circuit court would have been fully justified in quashing it. It equally results, that the clerk, not being as to this service the ministerial officer of the court, was not under his control and direction. The case stands precisely as if some other officer, having no connection with the court, had issued the process. In the case last supposed, no one would contend that the court would have had power to order the officer to change the date of the attachment.

Without intending to decide that the defendant in this case was without remedy, we are satisfied the defect could not be taken advantage of in the mode adopted.

The result of this opinion must be, to permit many acts, secular in their purposes, to be done on the Christian Sabbath; acts, repugnant to the moral and religious sentiments of the public. We have no power to administer the corrective.

The judgment of the circuit court is reversed, and the cause remanded.

STEIN *vs.* JACKSON.

[ACTION FOR DAMAGES COMMENCED IN JUSTICE'S COURT.]

1. *Practice in appeal cases from justice's court.*—Although, under sections 2368 and 2369 of the Code, an appeal case is required to be tried according to equity and justice, upon an issue to be made up under the direction of the court, and tried by a jury; yet the parties may, by agreement, waive these statutory rights, and submit the case to the decision of the court, without the intervention of a jury, and without regard to the pleadings.
2. *Substantial defect in complaint not available on error.*—When an appeal case is, by consent of parties, submitted to the decision of the court, "upon the facts as well as the law," a substantial defect in the complaint is not available on error.
3. *When judgment in appeal case is not revisable on error.*—Where the court is, by consent of parties, substituted in lieu of a jury to try the facts of a case, in which, without such consent, the law would not authorize the court to try them, its decision on the facts is not revisable on error.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. THOMAS A. WALKER.

THIS action was brought by David Jackson against Albert Stein, "to recover $50 damages for refusing to furnish plaintiff with water from the Mobile water-works," of which said Stein was the lessee; was commenced in a justice's court, and removed by appeal, by the defendant, to the circuit court; where, as the judgment entry recites, the parties agreed to dispense with a jury, and submitted the case to the decision of the court, "upon the facts as

well as the law." The court rendered judgment for the plaintiff, for $50, besides costs; and its judgment is now assigned as error. The view taken of the case by this court renders it unnecessary to notice the facts set out in the bill of exceptions.

WM. G. JONES, F. S. BLOUNT, and R. H. SMITH, for appellant.

GEO. N. STEWART, *contra.*

RICE, C. J.—According to sections 2368 and 2369 of the Code, an appeal to the circuit court, from the judgment of a justice of the peace, where the sum claimed exceeds twenty dollars, must be tried "according to equity and justice;" and the cause must be tried upon an issue, to be made up *under the direction of the court*, and tried by a jury.

Under these sections, the right is secured to each party, to require the court to direct the issue or issues upon which the cause is to be tried, and also the right to a trial of such issue or issues by a jury. But the parties may waive those rights; and where they have done so by a valid agreement, and have thus made a law for themselves, they must abide by it.

It is true, that in the present record, a complaint and three pleas are found. But no action of the court was asked or had upon them; nor does it appear that the attention of the court was in any way called to them. On the contrary, the judgment entry expressly states, that, "by consent of both parties, a jury is dispensed with, and *the cause submitted to the court, to decide upon the facts, as well as the law.*" It is evident the parties did not limit or confine the court in the trial, to a trial upon the mere issues tendered by the complaint or pleas; nor did the agreement restrict the court in the trial of the cause, by any issue made or tendered by any of the pleadings set forth in the record. The agreement waived the right of the parties to require the court to direct any issue to be made up, and their right to a jury trial, and submitted the cause to the court, to be tried and decided "upon the

facts as well as the law," without regard to the pleadings. The defendant, therefore, has no right, in violation of the agreement, to demand a reversal of the judgment against him, upon the ground that the complaint in the record does not contain a substantial cause of action. We do not decide, that the complaint does not contain such cause of action; but, conceding that it does not, the agreement of the parties, upon which the cause was tried, precludes the defendant from a reversal for such defect in the complaint.

The defendant contends, that the court below erred in its judgment upon the evidence. But the record does not set forth all the evidence upon which the court acted; and therefore, we are unable to say there was error in that respect.—See Stein v. Feltheimer, at this term. Even if there was such error, it has been decided by this court, that where the judge, *by the consent of the parties*, is substituted in lieu of a jury to try the facts, in a case in which, without such consent, the law would not authorize him to try them, his decision upon the facts cannot be revised. Barnes v. The Mayor of Mobile, 19 Ala. 707; Bott v. McCoy, 20 Ala. 579; Mims v. Sturdevant, 23 Ala. 664; Shaw v. Beers, 25 Ala. 449.

The record does not enable us to say there is any error; and the judgment of the court below is affirmed.

FAIL & MILES *vs.* McARTHUR.

[TROVER FOR CONVERSION OF SLAVES.]

1. *Error without injury in sustaining demurrer to special plea.*—The sustaining of a demurrer to a special plea, even if erroneous, is not a reversible error, when the record shows that the defendant had the benefit of the same matters of defense under the general issue.
2. *Admissibility of declarations as part of res gestæ.*—The declarations of a third person, explanatory of a contemporaneous act, are not admissible evidence

on the principle of *res gestæ*, unless the act which they explain is itself relevant and material.

3. *Admissions of partner admissible evidence against co-partner.*—In trover against a partnership, for the conversion of a hired slave by employing her in a service different from that which was specified in the contract, the admissions of one partner, during the existence of the partnership, as to the terms of the contract of hiring, are competent evidence against his co-partner.
4. *Estoppel against owner of hired slave from maintaining trover for conversion.*—If the owner of two hired slaves, after instituting an action for the conversion of one of them during the term, transfers to a third person the note given for the amount of the hires, and then regains the possession and ownership of it, by executing his own note in its stead, before it falls due or is paid, this does not estop him from recovering for the conversion.
5. *What constitutes conversion of hired slave.*—If a slave is hired for a particular service, and is afterwards employed by the hirer in another and different service, this is a conversion, if the owner elect so to treat it.

APPEAL from the Circuit Court of Wilcox.
Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by John G. McArthur against the appellants, as partners, to recover damages for the conversion of a hired slave. The suit was commenced on the 14th *February*, (?) 1854; but the complaint, which is styled by the clerk "amended complaint," alleges the conversion to have taken place on the 30th February, 1854, and is marked "filed 6th March, 1854." The defendants pleaded, 1st, the general issue; and, 2d, that they hired the said slave from the plaintiff, on or about the 1st January, 1854, for the whole of the year 1854, and that the term of hiring had not expired at the commencement of the suit. The court sustained a demurrer to the second plea, and issue was joined on the first.

On the trial, as the bill of exceptions states, "the plaintiff introduced evidence tending to show that, on the last of December, 1853, the defendants were engaged, as co-partners, in making brick in Wilcox county; that he hired to them, for the year 1854, two slaves, one of whom was the negro woman for whose conversion this suit is brought; that said negro woman was removed from the defendants' brick-yard, some time after the middle of January, 1854, to the plantation of the defendant Fail; that she was there put to picking cotton on the low grounds, where

there was more or less mud and water; and that, on the third day after she commenced work on the plantation, she was taken sick, and, after a few days illness, died. With a view of showing misconduct and neglect of duty on the part of plaintiff, the defendants attempted to show that said negro woman, within one month before said hiring, and while in plaintiff's possession, had given birth to a child, which had died. This evidence was admitted without objection on the part of plaintiff; and, in rebuttal on this point, the plaintiff introduced a witness who lived about a quarter of a mile from his house, and who testified, that about the last of November, 1853, his wife left home, to go to plaintiff's house, and, as she started off in that direction, told him that she had been sent for to see a negro woman there who was about to have a child; and that his wife told him, when she came home, that the negro woman had been delivered of a child. To each portion of this evidence the defendants objected; the court overruled their objections, and they excepted.

"It was in proof, that at and before the commencement of this suit, and while the defendants were co-partners, the defendant Miles said, that said negro woman was hired by them to work in their brick-yard. On this point, the defendants' counsel asked the court to instruct the jury, that the admissions of Miles were not evidence against his co-defendant, as this was an action of tort. The court refused to give this charge, but instructed the jury, that what Miles may have said, while he and Fail were partners, in reference to the contract of hiring, was evidence against both as to the terms of the contract, but was not evidence against Fail as to the conversion; and to the refusal to give the charge as asked the defendants excepted.

"It was in proof, also, that the defendants gave plaintiff a note for the amount of the hires of said two slaves, due the 1st January, 1855; and that plaintiff, after the commencement of this suit, sold said note to one Miller, but afterwards, before it fell due, and before any part thereof had been paid, got it back into his possession and ownership, by giving said Miller his own note in exchange.

On this point, defendants' counsel asked the court to instruct the jury, that if plaintiff, after the commencement of this suit, had sold said note, and got it back under the circumstances stated, this was an assertion of the original contract, and he could not recover for the conversion of the negro; which charge the court refused to give, and the defendants excepted.

"The defendants asked the court to charge the jury, also, that to constitute a special hiring of a slave, it was necessary that the parties should agree, that the slave should work at a particular place or business, and should engage in no other employment. This charge the court gave, but with this qualification: that it was not necessary to show that these express words, to-wit, 'that the slave should engage in no other employment,' were used by the parties in making the contract; and that they might determine from the evidence, whether such was the understanding and agreement of the parties at the time of the hiring, and was embraced in their contract; to which qualification of the charge asked the defendants excepted.

"The court further charged the jury, 'that if there was a mutual understanding and agreement between the parties that the negro was to work at the brick-yard, and the defendants removed her from the brick yard, and put her to work on a plantation, such disposal of her would violate their contract.' The jury afterwards returned to ask an explanation of this charge, and inquired of the court, 'whether the defendants should have hired the slave to work at one business exclusively, in order to constitute a special hiring.' In reply to this question, and in further instructions as to the law, the court said, that if a man hired a horse from a livery-stable, to go to Allenton, he had no right under this contract to go to another and a different place, and that such a contract would be a special contract; and closed by saying, 'that if the defendants hired the negro from the plaintiff to work at the brick-yard, and this was their agreement with him, such contract was a special hiring;' and to this charge, also, the defendants excepted."

The sustaining of the demurrer to the second plea, and the several rulings of the court to which exceptions were reserved, are now assigned as error.

D. W. BAINE, for the appellants.

WATTS, JUDGE & JACKSON, *contra.*

WALKER, J.—It is clear from the record, that the defendant had the advantage of the defensive matter of the second plea, under the general issue. Therefore, an error in sustaining the demurrer to the second plea, if one was committed, will not authorize a reversal of the judgment of the court below.—Dunlap v. Robinson, 28 Ala. 100; Nelson v. Bondurant, 26 Ala. 341; Goodwin v. McCoy, 13 Ala. 271; Shehan v. Hampton, 8 Ala. 946; Rakes v. Pope, 7 Ala. 166.

2. In order that the declarations of a third person may be evidence, as a part of the *res gestæ*, it is necessary that the act which they explain and qualify should itself be pertinent to the issue.—Gilbert v. Gilbert, 22 Ala. 529; Hooper v. Edwards, 20 Ala. 528; Robertson v. Smith, 18 Ala. 220. The wife of one of the witnesses declared, when in the act of going to the plaintiff's house, that she was going to see a negro woman, about to be delivered of a child; and when she returned, she declared that the woman had given birth to a child. It is a fatal objection to the competency of those declarations, that the acts of going to and of returning from the plaintiff's house, which they are supposed to qualify and explain, are totally immaterial and irrelevant. The declarations of third persons cannot become evidence, because they accompany acts of third persons which have no connection with the case. For the error in the admission as evidence of these declarations, the judgment of the court below must be reversed, and the cause remanded.

3. If the defendants, as partners, hired the slave of the plaintiff, for the service of the partnership, in a particular department of labor, and then employed her in one different from that stipulated by the contract, the conversion which results would impose a liability upon the

defendants as partners. The tortious conversion consists in the violation of a partnership contract, by the employment of the slave in a manner inconsistent with it; it is a legal inference, at the election of the plaintiff, from the particular violation of the contract. Under the decision in Myers v. Gilbert, 18 Ala. 467, a different rule of liability applies to tort-feasors, as between themselves, who commit such an act as that which makes the conversion here, from that which ordinarily prevails. The duty of contribution to the payment of the damages resulting from the tort appertains to both as partners.—Story on Partnership, 322, § 220. For this reason, the rule which makes the declarations of one partner, pending the partnership, evidence against all the partners, applies to this case.

4. There was no error in the refusal of the court to charge the jury, that the plaintiff could not recover, if, after the commencement of this suit, he had sold the note given for the hire of the slave during the term of the bailment, and had re-obtained the possession and ownership of the note, by giving his own note in lieu of it to the assignee. The court was bound to refuse this charge, unless the transfer of the note for the hire estopped the plaintiff, notwithstanding he had regained the possession and ownership of the note. In Moseley v. Wilkinson, 24 Ala. 411, it was held, that the bailor of a slave for hire is estopped from a recovery for the conversion of the slave during the period of the bailment, by receiving before suit brought payment of the hire for the entire term, if he had full knowledge of the conversion. In that case, the bailor, by an unequivocal act, treated the hirer as retaining that character, and responsible under the contract of hiring to the end of the term. This act consisting in the receipt of money by the owner from the hirer, it would have been prejudicial to the other party for the owner to have asserted an inconsistent right. The owner made his election to treat the bailment as continuing to the end of the term; both parties acted upon that election; and, upon principles of justice, as well as settled law, he was estopped from asserting the contrary in a suit for the

conversion of the slave. Here, the plaintiff, after suit brought, transferred the note, and then took it back. This was not an act treating the bailment as continuing to the end of the term, of such unequivocal import as will authorize an application of the doctrine of estoppel. The note included the hire of another slave. The plaintiff may have transferred the note with the intention of regaining it. The defendants did no act, referring to, or based upon, the treatment of the hiring as continuing to the end of the term.—Hooks v. Smith, 18 Ala. 338.

5. The court charged the jury, that a special hiring, for a particular employment, could be shown without the use of the express words, "that the slave should engage in no other employment;" and "that they might determine from the evidence, whether such was the understanding and agreement of the parties at the time of the hiring, and was embraced in their contract." This charge was correct. If a slave should be hired to one for a particular purpose, to be employed at a particular labor, there would be a special hiring for a particular purpose. He who hires a slave for a particular service has no right to employ the slave in another and different service; and if he does so, it may be treated as a conversion by the owner.—Hooks v. Smith, 18 Ala. 338; S. C., 19 Ala. 101; Moseley v. Wilkinson, 14 Ala. 411. This principle is not only settled in this State, but was well established at common law; and the books abound with adjudications recognizing it. Where one hired a horse, to ride from Boston 4½ miles to Brooklin, and, upon reaching Brooklin, rode 4½ miles farther to Watertown, he was held liable for a conversion of the horse.—Wheelock v. Wheelwright, 5 Mass. 104; Rotch v. Hawes, 12 Pick. 136. So, "if a horse is hired as a saddle-horse, the hirer has no right to use him in a cart, or to carry loads, or as a beast of burden; and one who borrows jewels, to wear to a ball, will be responsible if he wear them to the theatre, or to a gaming house. Edwards on Bailments, 238; see, also, Story on Bailments, §§ 232, 233, 234, 241.

Tested by the principles above laid down, the additional

instructions of the court, given on the request of the jury, were, in all respects, free from error.

The judgment of the court below is reversed, and the cause remanded.

WINTER & CO. *vs.* BURT.

[ASSUMPSIT ON PROMISSORY NOTE.]

1. *Opinion of witness as expert.*—A witness cannot be allowed to testify to the value of machinery, when it appears that he has not the knowledge requisite to enable him to testify as an expert.
2. *Proof of value of machinery.*—An expert, called to testify to the value of machinery, cannot be asked, "If said machinery cost $3,200, and was warranted to cut 3000 feet of inch boards in a day, and yet could cut but 1500 feet in a day, how much would it be worth?"
3. *Cross examination of witness.*—A witness may be asked, on cross examination, questions which would not be relevant or pertinent on his examination in chief.
4. *Admissibility of agent's declarations as evidence against principal.*—To make the declarations of an agent admissible evidence against his principal, they must be explanatory of some contemporaneous act within the scope of his authority.

APPEAL from the Circuit Court of Autauga.
Tried before the Hon. ANDREW B. MOORE.

ASSUMPSIT by J. S. Winter & Co., (a firm composed of Joseph S. Winter and John G. Winter,) against Martin R. Burt, as the maker of a promissory note for $1066 66, dated Montgomery, April 18, 1851, and payable on the 1st January next after date, to the plaintiffs' order, at their office in Montgomery; which note was proved to have been given in part payment for certain machinery manufactured for defendant, at the "Winter Iron Works" in Montgomery, by Gindrat & Co., which firm was composed of John G. Winter, Joseph S. Winter, and Abram Gindrat. No pleas appear in the record.

On the trial, as appears from the bill of exceptions, the plaintiffs offered in evidence the note sued on, with the written contract for the manufacture of the machinery; and proved that the note was given in part payment for the machinery, as stipulated in the contract. "There was evidence tending to show, that the machinery specified in the contract was delivered to the defendant, and was put up for him by one Doyle; he having refused an offer by plaintiffs to have said machinery put up, for a sum named, and to guaranty its being well done. The defendant introduced his son John as a witness, who testified, that he had never been engaged about a steam-engine, before being engaged with the one bought by his father from plaintiffs; that when he took it in charge as chief engineer, he had only about eight days experience, acquired by serving under Doyle for that time; that he knew nothing about the amount of pressure the boilers of that engine would bear,—did not know what was meant by giving head to the steam, nor what were the parts of the steam-engine, nor their use, nor how to manage the packing and rings around the piston in the cylinder where the steam escaped from the cylinder, nor the value and cost of a cylinder, piston, piston-head, or fly-wheel, used in steam machinery, or of any other part of said machinery; that he had never known one to be sold, at either private or public sale; that he had never put up such machinery, but had seen that machinery put up by Doyle; that he had attended a saw-mill about three years, and had sufficient knowledge of mills of that description to say how many hands were necessary to attend. The defendant offered evidence tending to show that, after said machinery had been run about six months, and while the chief engineer (said John Burt) was absent, the fly-wheel broke; that another wheel broke about two months afterwards, when said chief engineer was again absent; that the packing around the piston-head was too small for the cylinder, thereby letting the steam escape; and that the piston-rod also broke. There was evidence, also, tending to show that defendant took said broken machinery to the 'Winter Iron Work,s' and there had

them repaired; that the packing was found, by the machinist who examined the cylinder, to be sound and perfect; that the way to manage packing in a cylinder, in order to prevent the escape of steam, was to screw out, by means of screws placed in it for that purpose, the rings composing it; that said machinist, by thus turning the screws a few times, made the packing fit, and that this was all that was done to make it fit. Said John Burt further testified, that he did not know the use of said screws, and had never made an attempt to screw out the packing. Defendant then asked him, what was the value of said machinery at public sale; and the witness answered, that it was worth about $1,000. Plaintiffs objected to this question, and excepted to the action of the court in overruling their objection."

"The defendant asked one Gotbell, a witness, if said machinery cost $3,200, and was warranted to cut 3,000 feet of inch boards in a day, and yet cut but 1500 feet in a day, how much would it be worth; and the witness answered, that it would be worth about one half of that sum. The plaintiffs objected to this question and answer, separately, and excepted to the overruling of their objections. The defendant asked said Gotbell, if he had ever known theories to fail; and the witness answered, that he had. The plaintiffs objected to this question and answer, separately; but the court overruled both objections, and allowed the answer to go the jury, to test the knowledge of the witness; and to each ruling plaintiffs excepted.

"The defendant introduced a letter, signed 'Gindrat & Co., *per* A. Warner,' on proof that it was in the handwriting of said Warner, who was clerk of the 'Winter Iron Works,' and only had authority to correspond for the corporation on such matters as shipments of machinery and accounts due, but had no authority to make or alter contracts. There was no other evidence of authority in Warner to write said letter; and there was evidence that he was, at the time of testifying, living in Montgomery, and out of the employment of said iron-works. The plaintiffs objected to the introduction of said letter alto-

gether, and particularly to" the sentence which is in italics; but the court overruled each of said objections, and allowed the whole of said letter to be read to the jury; and to these rulings of the court the plaintiffs excepted. Said letter was in these words:

"Montgomery, Feb. 14, 1851.

"MARTIN R. BURT, Esq.—

Dear Sir: We shipped to-day, pr. st. *Emperor*, 2 boilers, 30 in. diam., 30 feet long. *Mr. Doyle has not yet arrived; will dispatch him to your mill as soon as he comes.* Have the kindness to send the boiler left at Watts' landing for you, to us, by the *Emperor*, next trip. Respectfully, GINDRAT & Co.,

per A. Warner."

"The defendant asked a witness, introduced by plaintiffs, if he and one Hilton had not been sworn in two other cases, in the circuit court of Montgomery, in which plaintiffs and third persons were parties, having no connection with the matters of this suit; and the witness answered, that it was so. The plaintiffs objected to this question and answer, and excepted to the overruling of their objection.

"The defendant asked said John Burt, how the new wheel and piston-rod, which had been made at said iron-works, and sent down to defendant's mill in charge of a man sent by said iron-works, had been put up; and the witness answered, 'In the same way that the other machinery had been put up.' The plaintiffs objected to this answer; but the court overruled their objection, and allowed said answer to go to the jury; and plaintiffs excepted.

"The defendant was allowed by the court, against the plaintiffs' objection, to prove that one Smith came to the mill, took out the saw, to put it in order, and put it back again, and that it did not then work so well as before,—this being after said machinery was repaired; and plaintiffs excepted.

"There was evidence tending to show, that one Lamb

was sent down by Gindrat & Co. to examine the manner in which said machinery was put up; and that said Lamb, while there, said that it was well put up. Neither one of the plaintiffs, nor any member of the firm of Gindrat & Co., was present when these declarations were made. The plaintiffs objected to the introduction of said Lamb's declarations as evidence, and excepted to their admission."

The rulings of the court above stated, and in the order stated, are now assigned as error.

ELMORE & YANCEY, for the appellants.

WATTS, JUDGE & JACKSON, *contra.*

STONE, J.—The bill of exceptions shows that John Burt had not the requisite knowledge to enable him to speak understandingly of the value of the machinery; and he should not have been allowed to give his opinion. 1 Greenl. Ev. § 440; Whipple v. Walpole, 10 N. Hamp. 130; Robertson v. Starke, 15 N. Hamp. 109.

The question propounded to the witness Gotbell, was also improper. It asked him to draw a conclusion from premises not justified by the law. Neither the cost of the machinery, nor the representations made as to its performance, could, in the form in which the question arose in this case, be considered by the witness in fixing its actual value. Its *value* was dependent on other considerations; and hence these should not have been made, to any extent, the basis of his opinion. There are decisions of this court which hold, that the contract price may be considered in ascertaining the damages.—Milton v. Rowland, 11 Ala. 732. That principle has nothing to do with this case.

The record does not inform us by whom the witness Gotbell was introduced. If he was on his direct examination, we are not able to perceive the pertinency or relevancy of the question, which inquired of him "if he had ever known theories to fail." On the other hand, if this question was propounded on cross examination, we cannot say, from anything apparent in this record, that it was improper. In Stoudenmeier v. Williamson, 29 Ala.

564–65, we employed the language, in reference to this subject, that "much must be left to the enlightened discretion of the presiding judge." See, also, Hopper v. Ashley, 15 Ala. 457. These rules will enable the presiding judge to rightly dispose of this question, should it arise on another trial.

The 4th and 8th assignments of error present substantially one and the same question. Both Warner and Lamb seem to have been, at most, agents of Gindrat & Co. The business of the former, so far as we are advised by the bill of exceptions, was "to correspond for the corporation, on such matters as shipments of machinery, and accounts due." We are not informed that he had any authority to make or alter contracts. In writing the letter which was read in evidence, he was engaged in no act, which will let in the declaration he made in relation to Doyle, as part of the *res gestæ*. We are not informed that Lamb's agency extended beyond the mission to ascertain if the machinery were correctly put up. This was not such an act as allowed the declaration of the agent to come in, in explanation of it.—See 1 Greenl. Ev. § 113; Brown v. Harrison & Robinson, 17 Ala. 774.

The 5th assignment of error is not well taken. The question was asked on cross examination; and under the authority of Stoudenmeier v. Williamson, *supra*, we cannot say the circuit court erred in allowing it to be answered.

The 6th assignment of error arises out of statements in the bill of exceptions which are made in terms so meager, and so entirely without the surrounding circumstances, that we prefer not to pass upon it.

The 7th assignment seems to be well taken. We are not informed that Smith was an engineer or machinist, or under whose employment he was acting. How the fact that he took out the saw and put it back, and the result, to-wit, that the saw did not then work as well as it did before, can legitimately be brought to bear on the issue formed in this case, we are left entirely to conjecture.

The judgment of the circuit court is reversed, and the cause remanded.

SMYTH *vs.* OLIVER.

[BILL IN EQUITY BY WIFE, FOR REMOVAL OF HUSBAND FROM TRUSTEESHIP OF SEPARATE ESTATE, AND ESTABLISHMENT OF HER INTEREST IN CHOSE IN ACTION TRANSFERRED BY HIM.]

1. *Removal of husband from trusteeship of wife's separate estate.*—If the husband sell and transfer, without the assent of his wife, a promissory note which constitutes the bulk of her separate estate under the act of 1850, having been taken for the purchase-money of her property sold by them jointly; and afterwards abandon her, and leave the State,—this is sufficient cause for his removal from the trusteeship of her separate estate.
2. *Sale and transfer by husband of chose in action belonging to wife's separate estate.*—Under the "woman's law" of 1850, the husband has no right to sell and transfer, without the assent of the wife, a promissory note given for the purchase-money of her property sold by them jointly.
3. *Implied trust against purchaser of trust property.*—A purchaser from the husband, of a promissory note belonging to the wife's separate estate, with notice, express or implied, of the wife's equitable rights, will be held a trustee for her benefit.
4. *Implied notice to principal.*—Actual notice to an agent is implied notice to his principal.
5. *Mulatto incompetent witness against white person.*—The son of a mulatto is by statute (Code, § 2276) rendered an incompetent witness against a white person.
6. *Mode of impeaching witness.*—In a chancery cause, the testimony of a witness, whose general character for honesty is shown to be bad; who is also shown to have been the active agent of the party by whom he is examined, in a transaction with a trustee involving a breach of trust, of which he was at the time cognizant; being intimate with, and related to, said trustee; and testifying to facts which are in themselves strange and unnatural,—should be disregarded, except so far as it may corroborated by other testimony.

APPEAL from the Chancery Court of Butler.
Heard before the Hon. WADE KEYES.

THE bill in this case was filed by Mrs. Sarah Oliver, suing by her next friend, against her husband, Charles Oliver, Robert B. Smyth, and Thomas Frost. Its material allegations were these: That complainant intermarried with said Charles Oliver, in Butler county, Alabama, on the 9th of January, 1851; that she was possessed, at

the time of her marriage, of an undivided interest in several slaves and other personal property, which belonged to her in her own right; that on the 6th February, 1851, she and her husband sold her interest in said slaves and other property, to Thomas Frost, for $812 50, and took his two notes for the purchase-money, one for $750, and the other for $62 50, payable on the 1st January next thereafter; that both these notes were, by the advice and direction of her husband, made payable to "Charles and Sarah Oliver or bearer," were delivered to complainant, and by her deposited in the hands of her husband for safe-keeping; that her husband, on the same day, or very soon afterwards, transferred and delivered said notes, without her knowledge or assent, and without consideration, to said Robert B. Smyth, who was cognizant of the fact that they constituted a part of her separate estate, and that her husband had no right to dispose of them, and who has since instituted an action at law on them, in the name of Charles Oliver for his use; and that her husband immediately abandoned her, and left the State. The prayer of the bill was, that the complainant's husband might be removed from the trusteeship of her separate estate; that the action at law might be enjoined, and said Frost compelled by decree to pay to complainant the amount due on the notes; and the general prayer, for other and further relief, was added.

The defendant Smyth answered the bill; alleging that he had no definite knowledge, until after his purchase of the notes, of the consideration on which they were founded; that they were purchased for him by an agent, Williamson Harrison, who discounted them by taking 12½ per cent. off the face of them, and paid full value for them; insisting that, on the face of the notes, said Oliver had a right to transfer or sell them, and that he is entitled to protection as a *bona-fide* purchaser for valuable consideration; and demurring to the bill for want of equity.

Motions were made to suppress the depositions of Thomas Frost and Williamson Harrison, for causes which are stated in the opinion of the court; but the motions do not appear to have been acted on by the chancellor,

who, on final hearing, rendered a decree for the complainant, which is now assigned as error.

WATTS, JUDGE & JACKSON, for appellant.

J. F. JOHNSON, *contra.*

RICE, C. J.—The marriage of the complainant with Charles Oliver occurred in 1851, in this State, which was at that time their domicile; and therefore, their respective rights, interests and powers, in relation to any property owned by her at that time, or which accrued to her afterwards and before the adoption of the Code, must be determined with reference to the provisions of the act of the 13th February, 1850, entitled "an act to alter and amend an act securing to married women their separate estates, and for other purposes, approved March 1, 1848." Pamph. Acts of 1849–50, p. 63.

The first section of that act declares, "that no husband shall, by his marriage, acquire a right to the property which his wife had upon his marriage, or which she may after acquire by descent, gift, demise or otherwise, except as is hereinafter provided for; and that all such property "shall be taken, held and esteemed in law," as her separate estate. The second section provides, that all such property "shall be taken, esteemed and held as trust property, and, with the exceptions hereinafter provided, the same shall be subject to, and governed by, all the rules of law now governing trust estates." The third section declares, that all such property "shall vest in the husband, *as the trustee of the wife;* and the husband shall be authorized, so long as he may continue such trustee, under the provisions of this act, to have and possess, and to control and manage, all such separate estate, without liability to account to the wife, her heirs, executors, or assigns, for the rents, proceeds and profits thereof." The fifth section declares, that "such property, or any part thereof, may be sold by *the husband and wife*, and conveyed by *their joint deed;*" * * * "and the proceeds of every such sale shall be held and regarded as the separate estate of the wife, under the provisions of this act, and may be

reinvested by the husband in the purchase of other property, or be used by him in such way as may be deemed most beneficial for the interest of the *cestui que trust.*" By the sixth section, he is authorized to give a valid acquittance and discharge to any person who may pay over to him any money due to his wife, or to any person who may deliver to him any property coming to his wife. By the tenth section it is declared, that "the word property, as used in this act, shall be construed, whenever it occurs, to include all moneys, stocks, credits, *or other effects.*"

The notes in controversy in this suit were delivered to the complainant, after marriage, for personal property which belonged to her at her marriage, and which was sold by her with the assent of her husband. Her husband, having obtained possession of these notes, passed them, without endorsement or written assignment, to Williamson Harrison, the agent of the respondent Smyth, and, immediately thereafter, abandoned his wife, and left this State. Smyth asserts that, through his said agent, Harrison, he bought the notes of the husband at a discount of $12\frac{1}{2}$ per cent, paid the money to the husband, and that the notes therefore belong to him as a purchaser from the husband.

It is clear, that the notes constituted a part of the separate estate of the complainant, under the provisions of the act above cited; and the first question to be considered is, whether the husband had the right to sell them for money, without her concurrence or consent.

The great and leading object of the act above cited, was to "secure to married women their separate estates," not only against third persons, but against the husband himself. Its first section expressly renders the husband incapable of acquiring, by his marriage, any right to the property of the wife, except as is provided for in its subsequent sections. The fifth section authorizes the property, or any part of it, to be "*sold* by the husband *and wife*," and the *proceeds* of every such sale to be *reinvested* by the husband in *the purchase of other property*," or to be "*used* by him in such way as may be deemed most beneficial for the interest of the *cestui que trust.*" The provision as to a

sale of the property is obviously restrictive, and was doubtless intended to prohibit any *sale* of the wife's property, except such as might be made "by the husband *and wife.*" The *reinvestment* by the husband, of *the proceeds* of every such *sale*, means something different from a mere *sale* of them. They are to be reinvested "*in the purchase of other property*"—not *sold* for money. So the privilege conferred on the husband, to *use* the proceeds of sale until reinvested, was not designed as an authority to him to *sell* them for money. "Used" means "employed, occupied, treated." The *proceeds* of a sale, made by *husband and wife*, of her property, *may be* by the husband alone reinvested in the purchase of other property; but, if he does not so reinvest them, then they may be "employed, occupied or treated" by him, in any way which can fairly be deemed conservative of the "interest" of the wife *therein*. His wife's *interest in these proceeds* is not to be destroyed by him, by *a sale*, or by any other act of his, except a reinvestment in the purchase of other property. Those proceeds may exist in the form of lands, slaves, horses, &c.; for, on the sale by the husband and wife, they may receive in payment horses, slaves or lands. When the proceeds of such sale exist in that form, it is manifest that, to allow the husband alone to *sell* them, would defeat the great and leading object of the act above cited. And when the proceeds of such sale exist in the form of promissory notes, we think a mere *sale* of them for money, by the husband alone, without the concurrence or consent of the wife, equally violative of the spirit of the act above cited. To authorize him to *sell* the *proceeds* of such sale, in every form in which they may exist, would amount, in practice, to an authority to him to destroy the protection which the legislature plainly intended to secure to the wife, by that provision which makes it essential to the validity of a sale by her husband of her property, in the first instance, that she should join therein. To hold that he has such authority, is to hold that, as soon as the property is sold by him and his wife, the proceeds are at his mercy. The statute does not provide or show that those proceeds were to be at his mercy; but,

on the contrary, it clearly shows that they were to be and remain her separate estate, until reinvested by him in the purchase of other property; and that the property in which they might be reinvested would instantly become her separate estate. Our conclusion is, that the husband in the present case had no right or authority to sell the notes; that his sale of them was a breach of trust; and that he is unfit to conduct or manage her separate estate, or to be longer allowed to continue to be her trustee.

But it is contended, that Smyth ought to be protected, as a *bona-fide* purchaser of the notes from the husband, without notice. Is he such a purchaser? Upon the pleadings and credible and competent proof, we think he is not.—Kennedy v. Green, 3 My. & K. 719; Carr v. Hilton, 1 Curtis' R. 393. Notice to his agent in the transaction, was notice to him.—Downes v. Power, 2 Ball & Beatty's Ch. Rep. 491. Through his agent, he obtained the notes with notice that the right in equity belonged to the complainant, and connived at the husband's breach of trust. He has, therefore, no right to retain or collect them as against the complainant; but she is entitled to follow them into his hands, and to a decree that they be paid to her.—Lewin on Trusts, 205, 206, 610; Dunbar v. Tredennick, 2 Ball & Beatty's Ch. Rep. 304; Mead v. Lord Orrery, 3 Atk. 235; Le Neve v. Le Neve, *ib.* 646; Ambler, 436; McLeod v. Drummond, 17 Vesey, 163; Bonney v. Ridgard, 1 Cox's Ch. Cases, note 1.

In Smyth's answer, it is set up as a defense, that the complainant advised the sale of the notes by her husband, and assented to it after it was made. What the effect of such advice and assent by her would have been, if proved, we need not decide, because the proof does not convince us that she either advised or assented to the sale.

In deciding the foregoing questions, we have excluded from our consideration the deposition of Thomas Frost, a witness for complainant; because it appears that he is the son of a mulatto, and, therefore, incapable by statute to be a witness against a white man.—Code, § 2276.

We have also felt bound, by just and settled rules of law, to disregard the testimony of Williamson Harrison,

the agent of and a witness for Smyth, so far as it is in favor of Smyth and not corroborated; because of his active agency and participation in the transaction on which Smyth bases his claim to the notes, his relationship to and intimacy with the faithless husband of the complainant, the strange and unnatural occurrences stated by him as facts, and his bad general character.—1 Starkie on Ev. 455, *et seq.* It is true, the evidence does not prove that his general character for truth and veracity is bad; but the proof is, that his general character for honesty is bad. In Ward v. The State, 28 Ala. 53, we held, that in assailing the credit of a witness, the law does not restrict the inquiry to his general character for truth. One of the main grounds upon which the credit due to his testimony depends, is his *honesty*. To be faith-worthy, he must be *willing*, as well as able, to declare the truth; and although he may not have made any general character as to *truth*, yet his credit may be impeached by evidence that his general character for honesty is bad. Such a character is a fact, which cannot be wisely or safely excluded from consideration, in determining whether the witness be the witness of truth.

We cannot discover any error prejudicial to the appellant; and the decree is affirmed, at his costs.

SMITH *vs.* GAFFARD.

[SLANDER FOR WORDS SPOKEN OF UNMARRIED FEMALE.]

1. *Sufficiency of complaint.*—In an action by an unmarried female, for the false speaking of words imputing to her a want of chastity, (Code, §§ 2220, 2229, and form of complaint for "*verbal slander*," p. 554,) if the words charged do not, *per se*, impute a want of chastity, they must be connected with an averment of the extrinsic facts necessary to show that they contained such imputation; *e. g.*, where the words charge a past pregnancy and miscarriage, the complaint must aver that the plaintiff was unmarried at such a

time as would make the pregnancy charged an imputation on her chastity; and this, notwithstanding it is alleged that she is an infant and unmarried. (RICE, C. J., *dissenting*.)

2. *When words charging procurement of abortion are actionable.*—The words, "I suppose C. was with child, and took something to make her lose it," although charging an offense involving moral turpitude, are not, *per se*, actionable, because they do not charge an indictable offense; the statute of this State (Code, § 3230) not applying to a woman who procures an abortion on herself, and the common-law offense being restricted to cases in which she was quick with child.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN GILL SHORTER.

THE complaint in this case was in these words:

"The plaintiff, Caroline Smith, an infant under the age of twenty-one years, who sues by her next friend, claims of the defendant $10,000, as damages for falsely and maliciously charging said plaintiff, who is an unmarried female, with a want of chastity, by speaking of and concerning her, in the presence of divers persons, in a conversation where the subject of the plaintiff's having, previous to that time, been pregnant with child, and having given birth to it by producing an abortion, was spoken of and referred to, these false, malicious, and scandalous words, in substance, 'I suppose Caroline Smith has lost a young one'; also, these words, 'Caroline Smith has lost a child'; also, these words, 'I suppose Caroline (meaning plaintiff) was with child, and took something to make her lose it'; also, these words, 'There was something the matter with Caroline Smith that Doctor Donald could not account for, until he sent for Mrs. Hawkins, and she examined her,' (meaning thereby that plaintiff had been pregnant, and had miscarried, or had given birth to a child,) viz., on the 1st May, 1856."

To this complaint a demurrer was interposed, on the following grounds: "1st, that there is no sufficient cause of action set forth in said complaint; 2d, that said complaint shows on its face that the words alleged to have been spoken are true; 3d, that the words charged to have been spoken by defendant are not, of themselves, actionable, and there are no averments in the complaint making

them actionable; 4th, that said complaint shows that plaintiff had been pregnant, and had given birth to a child by producing abortion, and that the words charged to have been spoken by defendant were spoken of and concerning such pregnancy and abortion."

The court sustained this demurrer; and the plaintiff, declining to amend, excepted, and took a nonsuit.

D. W. Baine, Martin, Baldwin & Sayre, and John K. Henry, for the appellant.—1. The complaint conforms to the requirements of the Code, and, consequently, is sufficient, even though it may not contain all the averments necessary to show a cause of action.—Pickens v. Oliver, 29 Ala. 537. On the authority of this case, it must be understood as charging the words to have been spoken under such circumstances as would constitute slander; and if the proof did not disclose such circumstances, no recovery could be had. The form prescribed by the Code is general, and intended to apply to all cases of verbal slander, whether the words are or not, *per se*, actionable. The averment of facts of inducement is not, in terms, dispensed with; but such is the necessary effect of the several statutory provisions. The *colloquium* and *innuendo* are dispensed with; and why should it be necessary to aver facts of inducement, when it is not necessary to show any connection between those facts and the words spoken? In an action for words charging the crime of larceny, but not actionable *per se*, would it be necessary to aver that property had been stolen, when the statute makes it unnecessary to aver that the words were spoken in reference to such larceny? Is it reasonable to suppose that the framers of the Code intended to require an averment of extrinsic facts, but dispensed with the link connecting them with the words spoken? The prescribed form professes to state all the necessary averments of the complaint, and to be general in its application. To confine it to any particular class of cases, would produce a strange jumble of conflicting systems of pleading: we would then have common-law suits for slander, and Code slander suits. If section 2229 is to be confined in its application

to cases in which the words charged are, *per se*, actionable, it becomes entirely useless and purposeless; for, in such cases, at common law, there was no necessity for a *colloquium* or *innuendo*.

2. The complaint sufficiently shows, when fairly construed, that the plaintiff was unmarried at the time of the charge. It shows that she is an infant, unmarried, and bearing the same name by which she was known when the charge was made. The term *unmarried*, in its ordinary acceptation, means a person who has never been married; and it is to be presumed that an unmarried female, under the age of twenty-one, never was married.

3. The words charging that plaintiff produced an abortion on herself, are clearly slanderous. They charge an offense involving moral turpitude, and indictable. The procuring of a miscarriage, by the pregnant woman herself, or by a third person, was a misdemeanor at common law. The distinction found in the books, as to the woman being "quick with child," or not, grew out of the English statutes on the subject.—4 Bla. Com. 198; 1 Hale's P. C., ch. 31, § 16; Tomlin's Law Dictionary, 108; Roscoe's Cr. Ev. 240; 3 Chitty's Cr. Law, 798; 1 Russell on Crimes, 553. Aside from the common law, the offense charged comes within the provisions of section 3230 of the Code, which is couched in terms similar to the English statutes, under which women who produced abortion on themselves were held included.—7 Bacon's Abr. (by Bouvier,) 189.

4. The complaint does not contain an admission of the truth of the charge, but only that the charge was the subject-matter of the conversation; and the same sentence avers distinctly that the charge was false.

WATTS, JUDGE & JACKSON, *contra*.—1. An action on the case, for the false speaking of words imputing to a woman a want of chastity, is purely statutory; the common law gave none, without proof of special damage. The statute dispenses with the averment of special damage, and gives an action, only where the words themselves impute a want of chastity. If the words themselves, though

intended or understood to convey that imputation, do not contain such charge, the additional facts necessary to complete the charge must be averred.

2. A charge of pregnancy is not an imputation on the chastity of a woman, unless she was at the time unmarried. Construing the complaint in this case most strongly against the pleader, it must be presumed that the plaintiff was married at the time of the alleged pregnancy.

3. The complaint itself admits the truth of the charge.

WALKER, J.—The complaint claims damages for the false charge of a want of chastity against the plaintiff, by speaking certain words. Those words attribute to the plaintiff past pregnancy, the having had a child, and a miscarriage; and some of them charge, "that she had taken something to make her lose" a child. The declaration avers, that she is an unmarried woman; but not that she was, either at the time of or before the pregnancy, unmarried. The complaint does not negative the coverture of the plaintiff at such a time as to make the pregnancy charged an imputation upon her chastity.

That the plaintiff was an infant, and unmarried, at the commencement of the suit, renders it probable that she had never been married; but the rule which construes most strongly against the pleader, forbids us to regard a mere probability of the existence of a fact, as an averment in pleading. Everything in the complaint may be true, and yet the words of the defendant may make no imputation against the plaintiff's chastity. The words do not, of themselves, imply the accusation of a want of chastity. They would only imply such an accusation, when referred to the absence of marriage at a certain time, which is not shown in the complaint.

The Code (§ 2220) makes words falsely impugning female chastity actionable *per se*. It dispenses (§ 2229) with the *colloquium* and *innuendo*, and prescribes that "it is sufficient to state in the complaint that the defendant falsely and maliciously charged the plaintiff with perjury, larceny, or other crime, as the case may be, in substance as follows, setting it out." It also lays down a form of

complaint for verbal slander, which conforms to section 2229. We do not understand either section 2229, or the form made in conformity to it, as dispensing with the necessity of showing by averments that the words spoken impute a want of chastity. If they do not, except when referred to some extrinsic fact, such fact must be averred; and it cannot be sufficient, in the absence of such averment, for the pleader simply to state that the defendant charged the plaintiff with a want of chastity, by speaking those words. Such a statement is a conclusion of the pleader, not authorized by the words. It may be authorized by the words, in connection with some other fact; but we cannot maintain the pleading by inferring the existence of facts which will authorize the pleader's conclusion.

Our decisions, that the necessity of averring title in an action to recover personal property is dispensed with in the Code, have no application here.—Pickens v. Oliver, 29 Ala. 528; Crimm v. Crawford, 29 Ala. 623. Those decisions are made in reference to a form which contains no averment of title.

2. It remains for us to consider the question, whether words which charge the procurement of an abortion are, *per se*, actionable. Those words are as follows: "I suppose Caroline was with child, and took something to make her lose it." If it be conceded that these words impute to the plaintiff the intentional production of an abortion by the taking of a drug under circumstances not allowed by the law, they are not, of themselves, actionable. Words, not imputing a want of chastity to a female, are only actionable, when they charge the commission of an offense indictable by law, and drawing after it an infamous punishment, or involving moral turpitude.—Hillhouse v. Peck, 2 Stew. & Por. 395; Perdue v. Burnett, Minor, 138; Dudley v. Horn and Wife, 21 Ala. 379; Berry v. Carter, 4 Stew. & Por. 387. It is decided in New York, that the procurement of an abortion, under circumstances not allowed by law, is an offense involving moral turpitude.—Bissell v. Cornell, 24 Wend. 354. We adopt that decision, as a correct statement of the law. After the

concessions heretofore made for the sake of the argument, it is a sequence from the adoption of the New York decision, that the words are actionable, *per se*, if they impute an indictable crime. The Code (§ 3230) provides, that any person, who willfully administers to any pregnant woman any drug or substance, to procure her miscarriage, unless the same is necessary to preserve her life, and done for that purpose, must, on conviction, be fined not more than five hundred dollars, and imprisoned not less than three, nor more than twelve months." This statute reaches and provides for the punishment of him who administers the drug, who directs or causes it to be taken, but not the woman who herself takes it. At common law, the production of a miscarriage was a punishable offense, provided the mother was at the time "quick with child."—1 Bla. Com. 129–30. This principle is thoroughly discussed, in reference to the authorities, in the case of The State v. Cooper, 2 Zabriskie's (N. J.) R. 52. To that decision, and the authorities cited in it, we refer, for a full vindication of the principle. See, also, Commonwealth v. Banks, 9 Mass. 388; Same v. Parker, 9 Met. 263. In this case, it does not appear from the words themselves, nor from any part of the complaint, that the imputation of an abortion, procured when the woman was "quick with child," was conveyed, or intended to be conveyed. Unless the words convey that imputation, or were intended to convey that imputation, they do not charge an offense punishable by law under indictment, and, therefore, are not, *per se*, actionable.

The judgment of the court below is affirmed.

RICE, C. J.—A count in slander, framed upon words which are *incapable* of an actionable meaning, is defective, as well under the Code, as under the common law.—Kirksey v. Fike, 29 Ala. 206, and authorities cited. Whether the words are *capable* of an actionable meaning, is the first question to be settled. If they are, then arises the second question for determination, to-wit, *whether their actionable quality is sufficiently disclosed by the count.* The first question is settled in the affirmative, by section 2220 of the

Code, which provides, that "any words, written, spoken or printed, of any female, married or unmarried, *falsely imputing to her a want of chastity, are actionable*, without proof of special damages." The common law does not furnish the rule for determining the second question. That law, so far as it might have had any bearing on that question, is repealed by the Code.—Commonwealth v. Cooley, 10 Pick. R. 37. The provisions of sections 2228 and 2229 of the Code, and the form of complaint for verbal slander given in the Code, (page 554,) amount to a complete revision of the former law upon the entire subject of what shall be deemed in this State a sufficient disclosure of the actionable quality of the words set forth in a complaint for slander; and as they amount to such complete revision, they operate as a repeal of the former law upon that particular subject, and furnish the binding rule of decision.—See Commonwealth v. Cooley, *supra;* Pickens v. Oliver, 29 Ala. 537.

Section 2229 of the Code not only provides that "no *colloquium* or *innuendo* is necessary in actions for defamation," but goes further, and explicitly declares *the new rule of sufficiency* in the disclosure of the actionable quality of the words in the complaint. Its language is as follows: "*It is sufficient* to state in the complaint that defendant falsely and maliciously charged the plaintiff with perjury, larceny, or other crime, as case may be, in substance as follows, setting it out."

To prevent all misunderstanding of this new rule, a form of complaint was given in the schedule of forms in the Code, which form is in the following words:

"A. B., plaintiff, vs. C. D., defendant. } The plaintiff claims of the defendant ——— dollars, as damages for falsely and maliciously charging the plaintiff with perjury, (larceny, or other crime, as the case may be,) by speaking of and concerning him, in the presence of divers persons, in substance as follows: (here set out the defamatory language,) viz., on the ——— day of ———. "E. F., att'y for plaintiff."

And then, "to make assurance doubly sure," section 2228 of the Code contains the following general rule, to-wit, "Any pleading, which conforms substantially to the schedule of forms attached to this part, *is sufficient.*"

I am fully convinced, that the complaint of the plaintiff in the present case "conforms substantially" to the form given in the Code for such cases; and I therefore feel bound to say that it "is sufficient." To enforce against her the common-law rule as to the sufficiency of the disclosure of the actionable quality of the words in the complaint, is, in my judgment, to enforce a rule which was repealed by the Code, and to deny to her the benefit of the new rule enbodied in the Code. As her complaint "conforms substantially" to the form given in the Code, it is not lawful to make it bad by construing it most strongly against her.

An examination of the forms contained in the Code will show, that the form of a complaint for verbal slander is more full and fair than some of the forms given for complaints in other civil actions, and more full and fair than some of the forms given for indictments for grave offenses; yet, in all previous cases, we have held *substantial conformity* to the form given for the particular kind of case, whether civil or criminal, to be sufficient. I intend to adhere to that position.

SHIELDS & WALKER *vs.* HENRY & MOTT.

[ACTION AGAINST OWNERS FOR GOODS FURNISHED STEAMBOAT.]

1. *What must be shown to authorize admission of evidence prima facie illegal and irrelevant.*—When a party offers evidence which is, *prima facie*, illegal as well as irrelevant, it is not sufficient for him to state to the court, "that he could probably, by other evidence, so connect the defendant with it as to make it competent evidence."
2. *When admission of illegal evidence is reversible error.*—The admission of illegal

evidence, against a party's objection, is an error for which the judgment will be reversed at his instance, unless the record shows that the jury were explicitly directed to disregard such evidence.

3. *Interest on open account for goods sold and delivered.*—On a contract to pay for goods sold and delivered, interest attaches from the delivery of the goods, unless the contract fixes some other time of payment.

APPEAL from the Circuit Court of Mobile.
Tried before the Hon. C. W. RAPIER.

THIS action was brought by Henry & Mott against the appellants, as part-owners of the steamboat *Farmer*, and was founded on an open account for goods sold and delivered to the officers for the use of the boat. The defendants separately pleaded the general issue, and the defendant Daniel Walker rested his defense on the ground that he was not a part-owner of the boat at the time the goods were sold and delivered. On the trial, after the plaintiffs had proved the sale and delivery of the goods, on the days specified in the account, running from the 6th November to the 24th December, 1852, "to Capt. Shields and Jacob B. Walker, who said they purchased them for the steamboat *Farmer*, of which they were part-owners, and that the defendant Daniel Walker was or had been a part-owner of said boat;" the said Daniel Walker proved by the statement of Jacob B. Walker, (which was admitted by consent to avoid a continuance,) that he (Daniel Walker) had sold all his interest in said boat to said Jacob B. Walker on the 3d October, 1852, and, since that time, had no interest whatever in the boat. The plaintiffs then offered to prove, by the clerk and book-keeper of said Jacob B. Walker, that the sale and transfer of Daniel Walker's interest in said boat was not entered, on the books of either the boat or said Jacob B. Walker, until January, 1853. On the defendant's objecting to the admission of any evidence relative to these entries, "the court ruled, that evidence of such entries would be incompetent and inadmissible, unless there was other evidence tending to show that the defendant had in some manner recognized or admitted them to be correct, or directed them to be made; but, on its being stated by

plaintiffs' counsel, that he could probably, by other evidence, so connect the defendant Daniel Walker with the entries, as to make them competent evidence, the court permitted the witness to testify in reference to the entries." The witness then testified, that said entries were not made on the books until January, 1853; also, "that Daniel Walker was the brother of said Jacob B. Walker, and, he presumed, could have access to the books of the latter whenever he pleased, though they kept separate offices; and that the contract relative to said sale and transfer was in the handwriting of said Jacob B. Walker. Thereupon, the court instructed the jury, that unless it was shown that the defendant Daniel Walker had recognized or admitted the entries to be correct, they were entitled to no weight, and should be entirely disregarded by them; and that the mere fact of Daniel Walker having access to the books of J. B. Walker would not amount to a recognition by him of the correctness of the entries. The defendant Daniel Walker, by his counsel, excepted to the ruling of the court in permitting said witness to testify in reference to said entries."

"The court further charged the jury, among other things, that if, when the goods were sold, no time was specified for payment or credit, and nothing was said on that subject, the law implied that the debt was payable presently; and, in such case, it would bear interest from the time of sale. To this charge, also, the defendant, by his counsel, excepted."

These two rulings of the court are now assigned as error.

GEO. N. STEWART, for the appellants.

ANDERSON & BOYLES, *contra.*

STONE, J.—The question on the admissibility of the evidence may be thus stated. The plaintiff offered evidence, which, by itself, was clearly irrelevant and inadmissible. In answer to the objection of defendant, his counsel stated to the court, "that he could probably, by other evidence, so connect the defendant Daniel Walker

with the entries, as to make them competent evidence." The *entries* spoken of were made by and in the books of other persons, not parties to this suit. To the admission of this evidence defendant excepted.

In the case of Wiswall v. Ross, 4 Porter, 321–30, this court said, "If the competency of any matter as testimony depends upon some fact of which there is no proof, there is no error in rejecting such matter, when presented alone, and without an offer to prove what might make it competent evidence.—See Clendenning & Bulkley v. Ross, 3 Stew. &. Por. 267 ; Gee v. Williamson, 1 Por. 320." In Crenshaw v. Davenport, 6 Ala. 390, the following language is found : "When the relevancy is not apparent from the evidence offered, but other facts will make it so, the duty of the party offering it is to state its connection with the other facts, in order that its relevancy may be disclosed to the court."—See Cunningham v. Cochran, 18 Ala. 480 ; Mardis v. Shackleford, 4 Ala. 443; Cuthbert v. Newell, 7 Ala. 457.

We do not think enough was stated in this case, to justify the introduction of the evidence. The statement made by the counsel was very indefinite, and falls far below the rule laid down in the authorities above cited. We do not say that, in all cases of testimony *prima facie* irrelevant and immaterial, the counsel should be required to state the minute facts which he relies on to show the relevancy. We think, however, that the statement should be of such facts as tend to show that the connection will be made. Otherwise, much of the time of the court may be wasted in fruitless investigation, and much illegal evidence be placed before the jury—evidence calculated to produce on the minds of that body impressions which are not easily eradicated.—Carlisle v. Hunley, 15 Ala. 623; Florey v. Florey, 24 Ala. 247. But, in this case, where the testimony objected to was not only *prima facie* irrelevant, but illegal, being the mere statement of a stranger to the record, we think the statement should have gone further, and shown such a state of facts, afterwards to be proved, as would reasonably convince the court that the legality of the testimony would be established. The same

rule governs a case of this character, as that which governs the introduction of secondary evidence.

The rule is settled in this State, that if illegal evidence be admitted, against the objection of the adversary, nothing less than an explicit direction to the jury to disregard such evidence will cure the error.—See authorities *supra*. It is here contended for appellees, that the court did instruct the jury to disregard the evidence we have been considering. We do not so understand the record. True, the court informed the jury, that "the mere fact of Daniel Walker having access to the books of J. B. Walker would not amount to a recognition by said Daniel of the entries as being correct." This was not a withdrawing of the evidence from the jury. It amounted to no more than an instruction to that body that one specified circumstance was not enough to connect Daniel Walker with the entries. The instruction should have been specific.

If the bill of exceptions contained evidence showing a recognition by Daniel Walker of the correctness of those entries, we would regard the erroneous action of the court as healed by such subsequent evidence; and the case would, on this point, be affirmed, on the doctrine of error without injury. The record contains no such evidence.

The charge of the court in reference to interest, is free from error, on the authority of Cheek v. Waldrum, 25 Ala. 152; Waring v. Henry & Mott, at the present term.

The judgment of the circuit court is reversed, and the cause remanded.

STEIN *vs.* FELTHEIMER.

[ACTION FOR DAMAGES AGAINST LESSEE OF MOBILE WATER-WORKS.]

1. *Practice in appeal cases involving less than twenty dollars.*—In an appeal case involving less than twenty dollars, which is tried by the court without the intervention of a jury, (Code, § 2369,) to enable the supreme court to revise the judgment of the circuit court, all the evidence must be set out in the bill of exceptions.

APPEAL from the Circuit Court of Mobile.
Tried before the Hon. THOMAS A. WALKER.

THIS action was brought against Albert Stein, the lessee of the city water-works of Mobile, to recover $10 damages for unlawfully closing and stopping the plaintiff's hydrant; was commenced in a justice's court, and removed by the defendant to the circuit court. The judgment of the circuit court is now assigned as error.

F. S. BLOUNT, and R. H. SMITH, for appellants.
GEO. N. STEWART, *contra.*

RICE, C. J.—On an appeal to the circuit court, from the judgment of a justice of the peace, when the sum claimed does not exceed twenty dollars, the cause must be tried by the court without the intervention of a jury. It is not necessary to file any complaint or any plea. Code, §§ 2368, 2369. No complaint or plea was filed in this case; but the parties submitted the cause to the court, and adduced such evidence as they respectively thought proper to adduce; and, after hearing all the evidence, the court gave judgment for the plaintiff, for ten dollars and costs. Whether the court erred in its judgment upon the evidence, it is impossible for us to say, because the bill of exceptions does not set forth all the evidence which was submitted to the court below. To have enabled us to revise that judgment, all the evidence should have been set out in the record.—Barnes v. Mobley, 21 Ala. 232; Shaw v. Beers, 25 Ala. 449.

The record does not show any error, and the judgment must be affirmed.

TAYLOR *vs.* KELLY.

[CONTEST AS TO VALIDITY OF WILL.]

1. *Competency of contestant as witness against will.*—One of the contestants, who is a party to the suit, and as such liable for costs, is an incompetent witness to defeat the probate of the will, even though he release all his distributive interest in the estate.
2. *Presumption in favor of judgment.*—Where a witness, who was excluded by the primary court as incompetent, is shown by the record to have been a party to the proceeding, though a subsequent statement in the bill of exceptions recites that his name was stricken out as a party, the appellate court cannot presume that his name was thus struck out when he was offered as a witness.
3. *What constitutes undue influence.*—Undue influence, such as will vitiate a will, must, in some measure, destroy the testator's free agency; must be equivalent to moral coercion; must constrain him to do that which is against his will, but which, from fear, the desire of peace, or some other feeling than affection, he is unable to resist.
4. *Effect of misrepresentation to testator on validity of will.*—A misrepresentation to the testatrix, respecting one of her children, made by the proponent of her will, which misrepresentation "did not have the effect to influence her in her deposition of her property that she had designed to bequeath to said child," does not vitiate the will.
5. *Undue influence avoided by subsequent ratification of will.*—The subsequent ratification of a will, when there is no fear on the part of the testatrix, and when the undue influence formerly exerted on her mind has been removed, destroys the effect of such undue influence as a ground for impeaching the will.
6. *Mental capacity of testator.*—A testatrix who, notwithstanding her great age, bodily infirmities, and impaired mind, has mind and memory enough to recollect the property which she is about to bequeath, the persons to whom she wishes to bequeath it, and the manner in which she wishes to dispose of it, and to know and understand the business in which she is engaged, is, in legal contemplation, of sound and disposing mind and memory.
7. *Implied revocation of will.*—A written instrument, whereby a testator, in compromise of a pending suit, surrenders his interest in certain slaves therein involved, does not operate as an implied revocation, *in toto*, of a will previously executed, embracing said slaves and other property; but, conceding that it is a revocation so far as the slaves are concerned, the will is nevertheless valid, and should be admitted to probate, as to the other property.
8. *Declarations of proponent not admissible to invalidate will.*—The acts and declarations of the proponent of a will, who is also one of the legatees, cannot invalidate the will, nor defeat its probate, even when they might estop him from claiming any interest under it.

9. *Charge too favorable to appellant.*—A charge to the jury, making the validity of an instrument as a will depend on certain extrinsic facts not authorized by law, when the instrument is a will on its face, is not an error of which the contestant can complain.
10. *Instrument, operating partly as contract, held will.*—An instrument in writing, purporting to be a will, whereby the testatrix "wills and bequeaths" her slaves, at a specified value, to one of her married daughters, "to go into the immediate possession" of her and her husband at the date of the instrument, "in consideration" that they supply her with all things needful for her support and comfort during her life, for which she allows them a specified sum out of the estimated value of the slaves; providing that, at her death, the residue of the estimated value of the slaves shall be divided among her several children; and giving all her household furniture to two of her daughters,—held a will, notwithstanding some of its provisions were operative as a contract *inter vivos*.
11. *Charge requiring explanation.*—A charge which, though ambiguous and involved, and, unexplained, tending to mislead the jury, does not assert an incorrect legal proposition, is not an error which will work a reversal of the judgment.
12. *Weight and effect of testimony.*—A charge to the jury, asserting that, "if witnesses differ, and all have equal opportunities of knowing the facts about which they testify, then, even if one has sworn affirmatively, the jury are not bound to believe him, but, in determining what is correct testimony, will look to all the facts and circumstances of the case,"—though involved, ambiguous, and, possibly, tending to mislead the jury, does not assert an incorrect legal proposition.
13. *Charge too favorable to appellant in referring legal question to jury.*—A charge which submits to the jury the decision of a legal question, which, as the record affirmatively shows, did not arise on the evidence, and thereby gives the appellant an additional chance for a favorable verdict, is not an error of which he can complain.

APPEAL from the Probate Court of Autauga.

IN the matter of a paper propounded for probate as the last will and testament of Nancy Taylor, deceased, which was in these words:

"State of Alabama, } Know all men by these presents,
Autauga county. } that I, Nancy Taylor, of the State and county aforesaid, do make and publish this my last will and testament. First, I will bequeath all my slaves, viz., Amanda, a woman about twenty-seven years of age, and her three children, viz., Sarah, nine years of age, Mary, about three years of age, Lucinda, nineteen months of age,—the four named slaves worth $1750,—to my daughter Martha S. Kelly, wife of Daniel K. Kelly, and the said negroes to go into their possession at the date of

this instrument, at the price above stated, in consideration that the said Martha S. Kelly and Daniel K. Kelly is to supply me with all things needful for my support and comfort during my life, for which I allow the said Daniel and Martha $500 out of the price of the said negroes. Second, I will that, at my decease, the balance of the $1750 be equally divided between my several children, except Martha S. Kelly, who is to have $100, and William L. Taylor, to whom I have advanced $70, which is to come out of his share, and James C. Taylor $15 which I have advanced to him, to-wit, Sally H. Lamberson, Judith W. Smith, Nancy C. Harwell, Fanny H. Williams, Elizabeth L. Beene, William Lack, the son of my daughter Lockey J. Lack, if living,—if dead, his share to go to Sally Lamberson, Judith W. Smith, Nancy Harwell, Elizabeth Beene, and Thomas C. Taylor. I give all my household property to Fanny Williams and Martha S. Kelly. Now, at my death, the said Martha and Daniel are to pay the remainder, which is $1250, as before stated; and it is my request, that the said Martha and Daniel endeavor to notify those heirs who live out of the State. In testimony whereof, I have hereunto set my hand, and affixed my seal, Febuary 1st, 1853.

her
"NANCY ⋈ TAYLOR.
mark

"We, the subscribing witnesses hereto, do certify that we saw the aforesaid Nancy Taylor sign, seal and publish the foregoing instrument as her last will and testament; that it was done in the presence of each of us; that we signed our names hereto, at the request of the said Nancy Taylor, in her presence, and in the presence of each other. In testimony whereof, we have hereunto set our hands, this 1st day of February, A. D. 1853.

"Thomas Hogg,
"A. Sample."

This instrument was propounded for probate by Daniel K. Kelly, and was contested by Thomas C. Taylor and William L. Taylor, who were sons of said Nancy Taylor, on the following grounds: 1st, that said instrument is not

the last will and testament of said decedent; 2d, that said instrument is a deed of gift, and not a testamentary paper; 3d, that said instrument is a deed of sale, and not a testamentary paper; 4th, that said instrument is void for uncertainty on its face; 5th, that said instrument was procured by undue influence on the part of said Kelly and his wife, and is therefore null and void; 6th, that said instrument was procured by fraud on the part of said Kelly and wife, by inducing said decedent, through false representations as to the treatment of her by her son Thomas C. Taylor, to leave the house of said Thomas, and reside with them; 7th, that said instrument was revoked by said decedent in her life time; and, 8th, that said proponent is estopped from offering said instrument for probate, by having surrendered up the slaves therein named, before the death of said decedent, to William L. Taylor, as administrator of the estate of William Taylor, deceased, and having offered them for sale, without objection, as the property of said William Taylor's estate.

The bill of exceptions purports to set out all the evidence, of which, however, it is only necessary to state the material portions bearing on the points here decided.

The proponent having proved, by the subscribing witnesses, the execution of the instrument propounded for probate, and the mental capacity of the testatrix at the time of its execution, the contestants then offered Thomas C. Taylor, a son of the testatrix, as a witness; having first produced and proved a release from the said Thomas to William L. Taylor, as the administrator of the estate of William Taylor, deceased, of all his interest in the estate of Nancy Taylor. "It was in evidence at this time," so the bill of exceptions states, "that no administration of any kind whatever had ever been granted on the estate of said Nancy Taylor; and that Jesse R. Jones, the general administrator of the county, had, within one hour before the trial of this cause commenced, applied to said court for letters of administration on said estate; which application the judge refused to grant. Under these facts, the court refused to allow said Thomas C. Taylor to be sworn as a witness, and the contestant excepted.

Before (?) the refusal of the court to allow said Thomas C. Taylor to be examined as a witness under said release, the contestant proved the due execution of another release," and again offered said Taylor as a witness; but the court still refused to permit him to be sworn, and the contestant excepted. The contestant offered the said witness a third, fourth, and fifth time, under three other releases; and reserved exceptions to each refusal of the court to allow him to be examined. These several exceptions are stated to have been reserved by the "defendant," or "contestant," in the singular; and there is an entry in the record, subsequent to the judgment entry, and not embraced in the bill of exceptions, to the effect that the name of Thomas C. Taylor, on motion of the contestants, and against the objection of the proponent, "was struck out from the objections filed to the probate of said instrument."

The contestant offered evidence conducing to sustain the allegations of fraud and undue influence on the part of Kelly and wife, and of mental incapacity on the part of the testatrix; and, in support of the allegation that the will was revoked by the testatrix, introduced a written agreement, under seal, signed by said testatrix, said Kelly, and said William L. Taylor, which was proved to have been executed in compromise of the suit therein referred to, and which was in these words:

"William L. Taylor, adm'r of the estate of Wm. Taylor, vs. Nancy Taylor, and Daniel K. Kelly.	In the chancery court held at Wetumpka, for the 15th district of the middle chancery division of the State of Alabama.

"In the above-stated case, it is agreed between the parties, that the said Nancy Taylor and Daniel K. Kelly hereby deliver to the said William L. Taylor, as administrator as aforesaid, the negroes sought to be recovered in this suit, viz., Amanda, a woman about 29 years old, and her children, viz., Sarah, a girl about 12 years old, Clark, a boy about 10 years old, Mary, a girl about 7 years old, Lindy, a girl about 6 years old, Lukelton, a boy about 3 years old, and Benjamin, a boy about

20 months old; to be administered upon by him as such administrator,—we claiming no right or title to them, except our rights in them as distributees of the estate of said William Taylor, deceased; and the said William L. Taylor is to dismiss said suit, at the costs of the plaintiff, and all bonds given in this case are to be released. Given under our hands and seals, this 3d day of January, 1856."

Under this agreement, the slaves were delivered up to the administrator, and were afterwards sold as the property of the estate.

At the request of the proponent, the court instructed the jury as follows,—the numbers being the same as in the record:

"1. If the jury believe from the evidence that the influence exerted to procure the making of the will did not amount to force, or coercion, destroying her free agency, then such influence was not an undue influence.

"2. If they believe from the evidence that the will was not obtained by the exercise of an influence amounting to coercion—by a motive tantamount to force or fear—such was not an undue influence.

"3. An influence, to be an undue influence, must be such as, in some degree, to destroy the free agency of the party making the will, and such as to constrain her to do what is against her will.

"4. Even if they believe from the evidence that Daniel K. Kelly made false representations as to Thomas Taylor; yet, if those representations did not have the effect to influence Mrs. Nancy Taylor in her disposition of her property that she had designed to bequeath to Thomas Taylor, such representations cannot vitiate the will.

"5. If the jury believe that Nancy Taylor, at the time she made her will, made it under [undue] influence; yet, if afterwards, when there was no cause for fear, and when the undue influence was removed, she ratified and confirmed the will, then the will is the same, in law, as if no undue influence had been exerted.

"6. If they believe from the evidence that Nancy Taylor, at the time she made the will, had a sound disposing

mind, she could make a will; that, for her mind to be a sound, disposing mind, it is not necessary that her memory be perfect, and her mind be unimpaired; but, if she had mind and memory enough to recollect the property she was about to bequeath, and the persons to whom she wished to will it, and the manner in which she wished it to be disposed of, and to know and understand the business she was engaged in,—then, in contemplation of law, she had a sound, disposing mind; and her great age, bodily infirmity, and impaired mind, do not vitiate a will thus made.

"7. If they believe from the evidence that Nancy Taylor signed, or caused her name to be signed to, the written agreement with Daniel Kelly and William L. Taylor, that is not a revocation of the instrument purporting to be her will.

"8. That if they believe Mrs. Taylor knew, when the slaves were taken away from Daniel Kelly's place, that they were taken off to be sold by William L. Taylor, as the property of William Taylor, deceased, that is no revocation of this paper, if they find it to be her will.

"9. If they believe from the evidence that Daniel Kelly signed the agreement as to the dismissal of the chancery suit, and gave up the negroes named therein, and stood by and saw them sold, and made no objection,—that does not vitiate this paper, if they find it be the will of Mrs. Nancy Taylor.

"11. If they find from the evidence that no money, or other valuable thing, was paid by Daniel Kelly to Mrs. Nancy Taylor, for the negroes named in the paper now propounded for probate; and that the negroes remained on the place where both Kelly and Mrs. Taylor resided, until they were taken away by the sheriff; and that Mrs. Taylor designed the bequests in this paper only to take effect at her death, and that Kelly was not to pay for nor own the negroes until her death,—then this is not a bill of sale.

"13. The acts and declarations of Daniel Kelly are not competent evidence to invalidate this paper, as the will

of Mrs. Nancy Taylor, to the prejudice of other legatees; and the jury cannot consider them for that purpose.

"14. That if witnesses differ, and all have equal opportunities of knowing the facts about which they testify, then, even if one has sworn affirmatively, the jury are not bound to believe that one, but, in determining what is correct testimony, will look to all the facts and circumstances of the case.

"15. Even if Mrs. Kelly was allowed to possess the slaves during Mrs. Taylor's life, yet, if they find that Mrs. Taylor designed the title to pass only on her death, this does not vitiate the will.

"16. If they believe that Mrs. Taylor owned the negroes when her will was made, but they were taken from her before her death, and sold as the property of William Taylor, this does not vitiate the paper as a will.

"17. If they believe that Mrs. Taylor signed the paper as her last will and testament, and in the presence of Hogg and Sample; and that they subscribed it as witnesses, in her presence, and the presence of each other; and that she was of sound and disposing mind, and made it without undue influence; and that it was not obtained by fraud; and that she did not revoke it, (and, to find it so executed, they will observe the rules of law on these subjects previously given them,)—then it is the last will and testament of Nancy Taylor, and they will so find."

The contestant excepted to each one of these charges, and requested others, some of which the court gave. The 9th, 10th, and 13th charges asked by the contestant, which were refused by the court, and the 11th, which was refused in part and given in part, (exceptions being reserved to each refusal,) are as follows:

"9. That if the jury find the paper propounded for probate to have been a will when executed and published, and that the chancery suit at Wetumpka was dismissed according to the agreement offered in evidence, then said agreement is a revocation of the will, and they must find the paper to be no will.

"10. That said agreement being a record of said chancery court, and a part of its judgment of dismissal,—its

genuineness cannot be impeached, or called in question, on this trial.

"11. That the proponent, Daniel Kelly, being a party to said agreement, and having stood by, without objection, and seen the administrator of William Taylor's estate obtain an order for the sale of the slaves from the probate court; and having delivered the slaves to said administrator for sale, and having attended the sale, and made no objection to it,—is estopped from offering the said paper for probate as a will; and he being estopped, the said paper cannot, if a will, be admitted to probate on his application.

"13. That if the jury believed from the evidence that the said Nancy Taylor executed the agreement offered in evidence, relative to the dismissal of the chancery suit, subsequent to the execution of the instrument propounded for probate; and that said chancery suit was dismissed, in pursuance of said agreement; and that the property described in said agreement is the identical property described in said will,—this is an implied revocation of said will."

All the rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

Geo. W. Gayle, and J. D. F. Williams, for the appellant.—1. Thomas C. Taylor was a competent witness for the contestant, under some one or all of the several releases proved. Moreover, the record shows that, before he was offered as a witness, his name was struck from the record as a party contestant.

2. The agreement relative to the dismissal of the chancery suit, to which Mrs. Taylor was a party, and which was subsequent to the execution of the paper propounded for probate, was an implied revocation of it as a will. 1 Jarman on Wills, 130; 4 Kent's Com. 512; Toller on Executors, 21.

3. The genuineness of Mrs. Taylor's signature to this agreement could not be impeached. The agreement had been received and acted on by the chancery court, and formed part of its decretal order; and the court must be

presumed to have decided on its genuineness before acting on it.

4. The charges of the court on the subject of undue influence, it is submitted, cannot be sustained.

5. If the will was executed under undue influence, its subsequent ratification after the removal of that influence did not give it validity.

6. The charges of the courts relative to the mental capacity of the testatrix are erroneous.

7. The paper propounded for probate was not a will. It was founded on valuable consideration, and passed the possession of the property during the life of Mrs. Taylor. Adams v. Broughton, 13 Ala. 731; Golding v. Golding, 24 Ala. 122; Elmore v. Mustin, 28 Ala. 313. The same instrument cannot operate both as a will and as a deed. Thompson v. Johnson, 19 Ala. 59.

8. Although the paper may have been valid as a will, Kelly was estopped from propounding it for probate.

ELMORE & YANCEY, *contra*.—1. Thomas C. Taylor was one of the contestants, and, therefore, an incompetent witness for the other contestant.—Gilbert v. Gilbert, 22 Ala. 529; Deslonde & James v. Darrington's Heirs, 29 Ala. 92. Moreover, he was one of the distributees of the estate, and, therefore, interested in breaking the will. 11 Ala. 249; 15 Ala. 618.

2. The correctness of the 1st, 2d, 3d and 4th charges is sustained by Gilbert v. Gilbert, 22 Ala. 529; 1 Wms. on Ex'rs, 39; 1 Jarman on Wills, 29, note 1.

3. The 5th charge, relative to the mental capacity of the testatrix, laid down a correct standard.—Lowe v. Williamson, 1 Green's (N. J.) R. 82; Watson v. Watson, 2 B. Monroe, 74; VanAlst v. Hunter, 5 Johns. Ch. 158.

4. The provisions of the Code (§§ 1597–99, 1613–14) have abrogated the common-law rule as to implied revocations of wills. Besides, the will disposed of property not embraced in the agreement relative to the dismissal of the chancery suit; and, as to this property at least, ought to have been admitted to probate, even if revoked as to the slaves.

5. The declarations and acts of the proponent, even when he is a legatee, cannot be received to invalidate the will.—Bunyard and Wife v. McElroy, 21 Ala. 311; Walker v. Jones, 23 Ala. 448.

6. The instrument was, on its face, a will, and not a deed.—Williams on Executors, vol. 1, p. 54; Walker v. Jones, 23 Ala. 448; Habergham v. Vincent, 2 Vesey, 231.

WALKER, J.—1. We pass by the question, whether the interest of Thomas C. Taylor was not released by some one or more of the several releases. He was one of the contestants, a party to the suit, and liable for costs; and, therefore, an incompetent witness, irrespective of his interest to defeat the establishment of the will.—Deslonde & James v. Darrington's Heirs, 29 Ala. 92; Gilbert v. Gilbert, 22 Ala. 529; Code, § 1649.

2. The name of the contestant appears, from a statement in the bill of exceptions posterior to the rejection of the witness, to have been stricken out by the court on motion. There is nothing which indicates that this was done before that contestant was offered as a witness, or cotemporaneously with the offer of him as a witness; or that the striking his name out as a party had any connection with, or reference to, the offer of him as a witness. We must pass upon the rulings of the court upon the question, in the light of the circumstances which appear to have been before the court at the time. We cannot presume, for the purpose of reversing the judgment, that the witness had ceased to be a party when he was offered to the court. If the court erred, it must be shown by the bill of exceptions, and cannot be presumed. The bill of exceptions states, that the first release was executed, and thereupon the witness offered; and that he was a son of the deceased. The release is then set out. It is then said, that, "*upon these* facts, the court refused to allow him to be sworn." Every subsequent offer of the witness is put expressly upon the ground of the release. No proposition, referring the restoration of his competency to the striking out of his name as a party, in connection with the release, was ever made. It is manifest that,

upon such a bill of exceptions, there is no room for us to say that the court below was ever called upon to decide the question of Thomas C. Taylor's competency as a witness upon the hypothesis that he had ceased to be a party to the suit when he was offered. If he was a party, he was clearly incompetent. We cannot, therefore, say that the court erred in rejecting the witness.

3. Mr. Justice Goldthwaite, in the case of Gilbert v. Gilbert, 22 Ala. 529, said: "Undue influence, legally speaking, must be such as, in some measure, destroys the free agency of the testator; it must be sufficient to prevent the exercise of that discretion, which the law requires in relation to every testamentary disposition. It is not enough that the testator is dissuaded, by solicitations or argument, from disposing of his property as he had previously intended; he may yield to the pursuasions of affection or attachment, and allow their sway to be exerted over his mind; and in neither of these cases would the law regard the influence as undue. To amount to this, it must be equivalent to moral coercion. It must constrain its subject to do what is against his will, but which, from fear, the desire of peace, or some other feeling, he is unable to resist." In 1 Williams on Executors, 42, we find the following language: "But the influence, to vitiate an act, must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment. It must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act. Further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear."—1 Jarman on Wills, 39; Dunlap v. Robinson, 28 Ala. 100; Leverett's Heirs v. Carlisle, 19 Ala. 80. The charges given, numbered 1, 2, and 3, assert propositions of law, which are laid down in these quotations; and we therefore cannot regard them as erroneous.

4. The effect of the fourth charge given, was not to take from the jury the consideration of the supposed

misrepresentation, in determining the extent of power acquired by the proponent over the testatrix; and whether he had withdrawn her confidence from the child misrepresented, placed her beyond the influence of that child, and thus subjected her to his control. The jury could have implicitly followed the instruction, and yet allowed the fact of the misrepresentation, in connection with the other evidence, to have its full weight upon the decision of the question of undue influence. The instruction to the jury was not, that they should disregard the misrepresentation as evidence in the case, but that the misrepresentation, not having produced a direct effect in influencing the bequest to him who was misrepresented, would not vitiate the will. It raised the question of the effect of the single fact of a misrepresentation, which did not influence the only bequest which, from its nature, it was calculated to affect directly. The propriety of the charge will be made apparent by asking the question: If there were no other evidence than the misrepresentation of Thomas C. Taylor, and the fact that it did not affect the bequest to him, would the will be vitiated? The charge simply answers this question in the negative, and, in doing so, does not violate the law.

5. If the 5th charge given had said, that although the will was made under undue influence, yet, if subsequently ratified when there was no cause for fear, and when the undue influence was removed, *the will would be valid*, we would hesitate to declare it correct. Such a charge would take from the jury the consideration of the other grounds upon which the will was assailed. The charge is not that, upon the facts presented in it, the will would be valid, but that the will "would be same, in law, as if no undue influence had been exerted;" or, in other words that a subsequent ratification, in the absence of fear and undue influence, would leave the case as if undue influence had not been proved. It is conceivable, that the cause of the undue influence, or the agency which exerted it, might be "removed," and yet the influence itself might linger upon the mind of the testatrix. We therefore do not say that a ratification, in the mere absence of the agency which produced the

undue influence, would make the will stand as if no undue influence had been exerted. The question presented by the charge is, whether a ratification, when there is no fear, and when the undue influence—the undue power over the mind of the testatrix—has been removed, will strip the case of all effect from undue influence, as a ground for assailing the will. Thus understood, we think the charge is correct. The undue influence could not be said to continue the exercise of its dominion over the mind, when it has been removed. When the undue influence has been withdrawn, the power and dominion over the mind and will are gone, and they are left free.

6. In the 6th charge there is no error. The standard of the capacity, necessary to qualify one to make a valid will, as laid down in the charge, was not too low. That the testatrix should make a valid will, it was not necessary that her memory should be *perfect*, and her mind *unimpaired*. If she had memory and mind enough to recollect the property she was about to bequeath, and the persons to whom she wished to will it, and the manner in which she wished it to be disposed of, and to know and understand the business she was engaged in,—she had, in contemplation of law, a sound mind; and her great age, bodily infirmity, and impaired mind, would not vitiate a will made by one possessing such capacity. These are the propositions which the charge asserts, and they are correct.—Harrison v. Rowan, 3 Wash. C. C. 385; 1 Jarman on Wills, 50; Coleman v. Robertson, 17 Ala. 84.

7. The instrument executed, in 1856, by Nancy Taylor, Kelly, and William L. Taylor, includes seven slaves, four of which are probably identical with the four slaves mentioned in the will, though that does not appear with certainty. The will does not bequeath only the four slaves which are claimed to be embraced in the instrument of agreement; but, after the bequest of the price fixed upon the slaves, it gives all the household property of the testatrix to Fanny Williams and Martha S. Kelly. Conceding that this instrument of agreement was a revocation of the bequests of the will so far as the slaves mentioned

in that agreement were concerned, it can have no other effect. Waiving the question of the effect of the instrument upon the bequests of the slaves, as one not necessary to be decided here, it is clear that the will was not thereby revoked *in toto*. It still remained a subsisting will as to the household property, and, on that account, was a proper subject of probate, if legally executed and established to the court.—1 Jarman on Wills, 166, § 3; 1 Williams on Executors, 167, note 2; Powell v. Powell, at the present term. It follows that there is no error in either the 7th or the 16th charge.

8. The charges numbered 9 and 13 were correct. It is established law in this State, that the proponent of a will cannot, by his declarations or acts, manufacture the evidence to defeat the probate of the will, to the prejudice of other legatees, notwithstanding he may be himself a legatee.—Roberts v. Trawick, 13 Ala. 68; Walker v. Jones, 23 Ala. 448; Bunyard v. McElroy, 21 Ala. 311. The proponent was not the only legatee under the will. Besides him and the contestants there were several others. We cannot say that those others assented to have their rights in the matter of the probate of the will affected by the declarations of Kelly, the executor. The question falls precisely within our former decisions, which we approve. The declarations and acts of the proponent of the will cannot estop the court from admitting the will to probate, and, consequently, cannot estop the offer of it for probate by the proponent in this case. If the proponent has estopped himself from asserting any right bestowed on him by the will, as against the contestants or either of them, it may be a matter for consideration in some subsequent suit; but it is entitled to no effect upon the question of the validity of the will in controversy in this case.

9. It may be that the provisions of the will, giving the slaves to Kelly and his wife, to go into their immediate possession, at the price of seventeen hundred and fifty dollars, and allowing to them five hundred dollars of that sum for supplying to the testatrix all things needful for her support and comfort during her natural life, make a

contract *inter vivos;* but every other provision of the instrument is clearly testamentary. The eleventh charge was not so favorable to the proponent, as he was entitled to have it. The construction of the instrument was for the court; and the court should have instructed the jury, that it was a will. That the court erred in making the question whether it was a will depend upon certain extrinsic facts, was a matter not prejudicial to the contestant. It was an error in his favor. It placed obstacles, unauthorized by law, in the way of the establishment of the will.

10. The fact that some provisions of the instrument offered for probate may have had the force of a contract, and may have become operative during the life time of the testatrix, does not deprive the other provisions of the will of their testamentary character, nor render the instrument inadmissible to probate as a will. Therefore, the court did not err by saying, in the charge numbered 15, that the possession of the slaves by Mrs. Kelly, in the life time of the testatrix, would not vitiate the will.

11-12. The 14th charge is somewhat complex and involved, and may, possibly, have contributed to mislead the jury, by seeming to make the latter of the two propositions which it contains the antithesis of the former. The charge, however, asserts no incorrect proposition; and its ambiguity, and tendency without explanation to mislead, will not, under the former decisions of this court, authorize a reversal.—Partridge v. Forsyth, 29 Ala. 200. It was the privilege of the party liable to be prejudiced, to protect himself by asking an explanatory charge. The two propositions of the charge are, that the jury were not bound to believe a witness, and that in, determining what is correct testimony, they must look to all the facts and circumstances of the case. In determining the credibility of a witness, the jury looking at all the various matters which legitimately affect his credibility, are to judge whether he merits belief.

13. There is no error in charge number 17. The objection made to it is, that it left the question of revocation, which is supposed to be a question of law, to the jury. Let it be conceded that the revocation of the will involves a ques-

tion of law, and yet the charge contains no error prejudicial to the appellant. The bill of exceptions set out all the evidence, and there is no proof tending to show a revocation of the will. The charge, therefore, in making the negation of a revocation necessary to the establishment of the will, imposed an *onus* upon the proponent which did not belong to him; and thus, if there be error in the charge, it is one favor of the appellant.

14. The principles which we have laid down in passing upon the charges given, cover the questions presented by the charges asked and refused, and show that the court was correct in refusing them.

On the margin of one of the charges asked by the appellant, the presiding judge wrote "*refused*," and on the face of the same charge, and near the bottom of it, he wrote "*given*." The bill of exceptions states, that the court gave that charge in part, and refused it in part. The charge asserts the two propositions, that certain acts of Kelly would estop him from offering the will for probate, and that he being estopped, the will could not be admitted to probate on his application. The appellant was not entitled to have either one of those propositions given as a charge to the jury; and if either was given, he obtained so much more than he ought to have had. We cannot reverse the case for the refusal of the court to give or refuse the charge as asked, when there is no exception for that omission, and it affirmatively appears that the appellant was not prejudiced thereby.

The judgment of the court below is affirmed.

CITY COUNCIL OF MONTGOMERY *vs.* MONTGOMERY & WETUMPKA PLANK-ROAD CO.

[ACTION BY MUNICIPAL CORPORATION ON PENAL BOND.]

1. *General powers of corporations.*—A corporation, public or private, can only exercise such powers as are expressly conferred by its charter, and such as are necessary and proper to carry into effect its granted powers; and when a corporation is created for a specific purpose, it has an implied power to use the necessary and usual means to effect that purpose.
2. *Power of corporate authorities of Montgomery to aid in construction of plank-roads.* The 14th section of the charter of the city of Montgomery, conferring on the corporate authorities power and authority to enact such laws and regulations as may be deemed necessary, "in relation to the streets and highways, public buildings and powder-magazine, and every other matter and thing which they may deem necessary for the good order and welfare of said city," does not authorize them to construct or aid in constructing a plank-road or bridge beyond the corporate limits of said city; nor is the exercise of such power a necessary means of effecting the purpose for which said corporation was created, or necessary to carry into effect any of the powers expressly granted; consequently, the loan of the city bonds to the Montgomery and Wetumpka Plank-Road Company, so far as relates to the building of a bridge across the Tallapoosa river and the construction of said plank-road beyond the limits of the city, was unauthorized and void.
3. *Sufficiency of complaint.*—Where the complaint alleges a loan of city bonds to a private corporation, it is not necessary to aver that the corporation received the proceeds of said bonds: if the bonds were in such condition that they could not be made available, this is matter of defense, to be presented by a proper plea.
4. *Validity of bond taken by municipal corporation without authority under charter.* A penal bond, taken by a municipal corporation from an incorporated plank-road company, and conditioned for the faithful application by said plank-road company of certain city bonds, loaned by said municipal corporation, without authority under its charter, to aid in the construction of a bridge and plank-road, and for the completion of said bridge and road by a specified day,—is invalid, and cannot be enforced by suit; nor is its validity affected by a subsequent sale or transfer of the city bonds by the plank-road company.
5. *Judicial notice of rivers and towns.*—The courts of this State judicially know that no part of the Tallapoosa river lies within the corporate limits of the city of Montgomery.
6. *Judicial notice of charter of corporation.*—Judicial notice cannot be taken of the charter of an incorporated plank-road company, which is a private corporation.
7. *Bond partly void, and partly valid.*—A penal bond, taken by a municipal corporation, and conditioned for the faithful performance by the principal

obligor of certain public works, some of which said corporation had no authority under its charter to construct or aid in constructing, is valid as to that portion of the works which the corporation had authority to construct, though invalid as to the residue.

8. *Estoppel against party contracting with corporation from alleging invalidity of contract.*—A party who contracts with a municipal corporation for the performance of works which the corporation has no authority to construct, and who has received the benefit of his contract, is not estopped, when sued by the corporation, from setting up its want of authority to make the contract.

APPEAL from the Circuit Court of Montgomery.
Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by the appellant, and was founded on a penal bond, dated in June, 1852, and signed by James F. Winter, as president, in behalf of the Montgomery and Wetumpka Plank-Road Company, as principal, together with John G. Winter and others as sureties; which bond was conditioned as follows: "Whereas the said city council of Montgomery hath loaned to the said Montgomery and Wetumpka Plank-Road Company bonds of the city of Montgomery to the amount of $20,000, to be used by said company in the completion of said road, and in the building of a bridge across the Tallapoosa river: Now, therefore, the condition of this bond or obligation is such, that if the funds arising from said bonds shall be faithfully applied by said Montgomery and Wetumpka Plank-Road Company to the completion of their said road and the building of a bridge over the Tallapoosa river, and if the said road and bridge shall be completed by the 1st day of March, 1853, then this obligation shall be null and void," &c.

The following breaches were assigned in the complaint:

"1. That the funds arising from the said bonds, loaned by plaintiff to said plank-road company, to be used by said company in the completion of said road, and in the building of a bridge across the Tallapoosa river, were not faithfully applied by said plank-road company to the completion of said road and the building of said bridge; but it wholly failed and neglected so to do, and still fails and neglects so to do."

"2. That said defendants did not and would not com-

plete the said road and bridge by the 1st day of March, 1853, but wholly failed and neglected so to do."

"3. That said plank-road company did not complete said road and bridge by the 1st day of March, 1853, but wholly failed and neglected, and still fails and neglects to do so."

"4. That the funds arising from said bonds, so loaned as aforesaid, were not faithfully applied by said plank-road company to the completion of said road and the building of said bridge; and that said company did not complete its said road, nor build said bridge over the Tallapoosa river, by the 1st day of March, 1853, but wholly failed and neglected so to do, and still fails and neglects to do so."

The defendants craved oyer of the bond and condition, and demurred to the complaint; assigning the following causes of demurrer: 1st, "that said bond and cause of action are founded upon, arise out of, and were delivered, as appears on the face thereof, on an illegal consideration"; 2d, "that said bond was executed and delivered on a consideration which was given in violation of plaintiff's charter, and is void"; 3d, "that the consideration of said bond was illegal, because plaintiff had no power or authority by its charter to issue and loan its bonds as set forth in the condition of the bond declared on, and the same are therefore void, and constitute no consideration for the bond declared on"; 4th, "that the complaint does not aver that said plank-road company ever received the proceeds of said bonds, or any of them"; and, 5th, "that the contract, as shown in the complaint, is too uncertain and indefinite to furnish a measure of damages that would sustain an action."

The court sustained this demurrer, and its judgment thereon is now assigned as error.

James E. Belser, with whom were Fair & Whatley, for the appellant.—1. The appellant is a public municipal corporation, having authority under its charter to do anything which is reasonable and proper for the advancement of the public welfare. The grant contained in its

charter is equivalent to legislative power. The charter is silent as to what contracts the city may make, or how it is to act for the public welfare; hence, it may enter into such agreements as are beneficial to the public interests. It may borrow money, execute and dispose of its bonds, aid in the construction of public works outside of its territorial limits, or do any other act which, in the opinion of the corporate authorities, may be deemed necessary for the welfare of the city, or advantageous to its interests. In support of these positions, see the following authorities: 6 Yerger, 499; 6 Humph. 519; 2 Hill's (N. Y.) R. 439; 9 Paige, 470; 1 Sandf. Ch. 280; 1 Sandf. S. C. 53; 7 Ohio, 354; 1 Watts, 385; 13 Barbour, 324; 9 Humph. 269; 6 Pick. 427; 11 Vermont, 402; 5 Gill & John. 424; 5 Hill, 137; 15 John. 44; 5 Barr, 345; 4 Comstock, 464; 12 Barbour, 28; 1 Cowen, 514; 11 Serg. & R. 411; 1 Rhode Island R. 312; 5 How. (U. S.) R. 83; 7 Serg. & R. 343; 12 Geo. 23; 13 Penn. 13; 1 Randolph, 76; 3 Randolph, 142; Angell & Ames on Corporations, 288.

2. Although the contract may be unauthorized by the plaintiff's charter, the defendants cannot take advantage of the invalidity of the contract, after having received and enjoyed its benefits.—2 Ala. 451; 5 Ala. 256; 8 Ala. 828; 14 Penn. 83; 7 Ohio, 357; 8 Sm. & Mar. 173; 1 Rich. 283; 6 Hill, 37; 5 B. Monroe, 130; 16 Mass. 94; 2 Kelly, 92; 7 Metcalf, 275; 3 Randolph, 136; 8 Wheaton, 388; 2 Litt. 300; 3 Randolph, 136; 4 Comstock, 464.

N. W. Cocke, and Jno. A. Elmore, with whom were Watts, Judge & Jackson, *contra*.—1. The powers of a municipal corporation, in common with all delegated political powers, are to be strictly construed.—Nichol v. Mayor of Nashville, 9 Humph. 262; Halstead v. Mayor of New York, 3 Comstock, 430; Hodges v. City of Buffalo, 2 Denio, 110; 2 Selden, 92; 4 Hill, 76; 12 Barbour, 559; 22 Conn. 552; 1 Sneed, 698; 1 Bay, 383; 1 Hill, (S. C.) 55. A corporation, created by statute, has no other powers than such as are specifically granted, or such as are necessary to carry the granted powers into effect; and its general powers are restricted by the nature

and objects of its institution.—Angell & Ames on Corporations, § 111; Beaty v. Lessee of Knowler, 4 Peters, 152; Ohio v. Wash. Lib. Co., 11 Ohio, 96; Barry v. Mer. Ex. Co., 1 Sandf. Ch. 280; Fire Ins. Co. v. Ely, 5 Conn. 560; S. C., 2 Cowen, 699; People v. Utica Ins. Co., 15 Johns. 383. It can make no contract which is not necessary, directly or indirectly, to enable it to answer the purpose of its creation; nor can it apply its funds to any purpose which is not within the legitimate purposes for which it was created.—Angell & Ames, § 256; 2 Denio, 110; 22 Conn. 552; 7 Eng. Law & Eq. R. 505; 10 Beavan, 1. If it exercise powers foreign to the purpose of its creation, its acts are void.—3 B. & Ald. 12; 1 McLean, 43; 4 Ala. 558, and other authorities *supra*.

2. The provision contained in the 14th section of the appellant's charter, authorizing the corporate authorities to pass laws relative to the streets, highways, &c., "and every other matter and thing which they may deem necessary for the good order and welfare of said city," does not confer the power claimed and exercised in the making of the contract here sued on. The grant of these general powers is restricted by the nature and object of the creation of the corporation. The word *welfare*, in its ordinary and familiar signification as applicable to States, is defined by Webster to be, "exemption from any unusual evil or calamity; the enjoyment of peace and prosperity, or the ordinary blessings of society and civil government." In the connection in which the word is here used, it was intended to refer to matters involving the public safety. The construction for which the appellant contends could not have entered into the contemplation of the legislature by which the charter was granted, for subscriptions by municipal corporations in aid of plank-road companies, or other works of internal improvement beyond the corporate limits, were then unheard of. Since such subscriptions have received public attention, the common understanding of the country, and the history of legislation on the subject, have indicated that the power to make them requires a special grant of authority. In this State, counties have never exercised the power to

apply the public funds to the construction of jails or court-houses, or to impose taxes for their erection, without a special act of the legislature; and the powers of the commissioners, in all matters of a public nature involving the expenditure of the county funds, have been strictly construed by the courts. The special act of 1846, authorizing the city council of Montgomery to issue what are known as the "State-house bonds," and the subsequent act of 1848, conferring power to pass ordinances to regulate the erection of wooden buildings, &c., are legislative interpretations of the original charter, which were supererogatory under the construction of that charter for which the appellant contends. A provision, very similar in its terms to that contained in the 14th section of this charter, was construed in Beaty v. Lessee of Knowler, 4 Peters, 171, and held not to confer unlimited powers. To the same effect are the cases above cited, from 10 Beavan, 1; 3 B. & Ald. 11; 8 Gill & John. 248; 1 Md. Ch. Dec. 542; 1 Sneed, 698; 13 Mass. 272.

8. The power here claimed cannot be deduced from the purpose and object of the appellant's corporate creation. The purpose for which a municipal corporation is created is not clearly defined. In Nichol v. Mayor of Nashville, 9 Humph. 268, it is said: "A direct corporate purpose might be styled to be one which, in its direct and immediate consequences, operates upon the interests of the corporation. Such would be all police regulations for the government of the town, the promotion of good order, the protection of its citizens from the lawless, the suppression of vice, the opening and preservation of streets, highways and alleys, the erection of market-houses and hospitals, supplying the town with water, &c." These and similar matters are doubtless within the legitimate purposes for which such a corporation is created. But the promotion of the commercial or pecuniary prosperity of a city or its citizens, it is confidently insisted, is not itself a *purpose* for which such corporation is created; on the contrary, this is a mere *incident*, or *consequence*, flowing from the exercise of the powers within the purpose of its creation. If the individual members of such corporation

are secured the blessings of good order, health, and security in their persons and property, their commercial or pecuniary prosperity follows as a consequence. The claim of power, then, to aid in a work of internal improvement, because it will advance the commercial or pecuniary prosperity of the city or its citizens, cannot be sustained.

4. The defendants are not estopped from setting up the want of authority on the part of the corporation, by the fact that they have received the consideration. All estoppels are mutual; and if one party is bound, both are. This doctrine would, in effect, destroy all restrictions on the powers of corporations.—Angell & Ames, § 256; Gage v. New Market Railway Co., 14 Law & Eq. R. 57; Albert v. Savings Bank of Baltimore, 1 Md. Ch. 407; Ohio Life Ins. & Trust Co. v. Mer. Ins. & Trust Co., 11 Humph. 1. Of all the cases cited by appellant's counsel to this point, that from 6th Hill, 33, is the only one which sustains it; and it is not well considered, and is unsuported by argument or authority. In all the other cases, the question was in reference to an abuse of an express power, and not whether a particular power was given; abuses of power which amounted to a violation of the charter, for which the only remedy was in the State.

STONE, J.—The authority of the city council of Montgomery, to make the contract sued on in this case, is claimed under the 14th section of its charter, which reads as follows:

"The said city council of Montgomery shall have full power and authority to make, ordain and enact such laws and regulations, (not contrary to the constitution and laws of this State,) as may be deemed necessary in relation to the streets and highways, public buildings and powder magazine, and *every other matter and thing which they may deem necessary for the good order and welfare of said city.*"

In section 1, it is declared, that the city council of Montgomery has authority "to do and perform any other acts incident to bodies corporate."

The act incorporating the city of Montgomery creates it a municipal corporation, and confers on it the usual

powers of such bodies. No power, except for a few specified objects, is conferred on its functionaries, which in its exercise looks beyond the limits of the city.

At an early day, Judge Saffold, speaking of the powers of corporations, employed the language, that "the act of incorporation is to them an enabling act. It gives them all the power they possess."—State v. Stebbins, 1 Stew. 299–308. The principles asserted in the case cited have become the settled rule of construction in this court.—State v. Mayor and Aldermen of Mobile, 5 Porter, 279; Mayor and Aldermen v. Allaire, 14 Ala. 400; *Ex parte* Burnett, 30 Ala. 461, and authorities cited.

In *Ex parte* Burnett, *supra*, we considered the question of the powers of corporations; and we there held, that such bodies can only exercise such powers as are expressly conferred on them, and such as are necessary and proper to carry into effect the granted powers. To these we may add, "the creation of a corporation, for a specified purpose, implies a power to use the necessary and usual means to effect that purpose."—Angell & Ames on Corporations, 200.

In the case last cited, we showed that the same rules for the determination of their powers prevailed both as to public and private corporations.—See that case, and the numerous authorities in support of these propositions.

Looking into the charter of the city of Montgomery and its amendments, we find no express authority to enter into the contract declared on; neither is the exercise of such power necessary to carry into effect any of the expressly granted powers; nor was the exercise of the power under consideration a necessary means of effecting the purpose for which this corporation was created. The question then arises, do the general clauses, copied in the opening of this opinion, aid the appellant in this case?

In the case of Beaty v. Lessee of Knowler, 4 Peters, 152–171, the supreme court of the United States held the following language: "The provision in the tenth section, that the 'directors shall have power to do whatever shall appear to them to be necessary and proper to be done for the well ordering of the interest of the proprietors, not

contrary to the laws of the State,' was not intended to give unlimited power, but the exercise of a discretion within the scope of the authority conferred. If the words of this section are not to be restricted by the other provisions of the statute, but to be considered according to their literal import, they would vest in the directors a power over the land, only limited by their discretion. They could dispose of the land, and vest the proceeds, in any manner which they might suppose would advance the interest of the proprietors. It is only necessary to state this consequence, to show the danger of such a construction." See, also, The People v. Utica Ins. Co., 15 Johns. 358, 383; Stetson v. Kempton, 13 Mass. 272, 278–9; State of Ohio v. Washington Social Library Co., 11 Ohio, 96; Angell & Ames on Corporations, 3d ed., 84–5–6.

The language found in the charter which was construed in the case of Beaty v. Lessee of Knowler, *supra*, strikingly resembles the clause from the act incorporating the city of Montgomery, which we are considering. The grant of power in the one case is, that "the *directors shall have power to do whatever shall appear to them to be necessary and proper to be done*," *&c.* In the other, it embraces "*every other matter and thing which they may deem necessary for the good order and welfare of said city.*" In this case, as in the case from 4th Peters, *supra*, if the words of the charter "are not to be restricted by the other provisions of the statute, but to be considered according to their literal import, they would vest in the corporate authorities a power, * * * only limited by their discretion." We cannot believe it was the intention of the legislature to confer on the city council of Montgomery "unlimited power"; but only to grant to that body the right to exercise "a discretion within the scope of the authority conferred." In other words, we limit the words, "every other matter and thing," as found in the act, to such subjects as are cognate to the powers expressly conferred.

Arriving at these conclusions, it follows, that the city council of Montgomery had no authority to construct, or aid in constructing, a plank-road or bridge outside of the corporate limits of the city, unless such road or bridge

should become necessary to carry into effect some power expressly granted. No clause of the act of incorporation has been pointed out, to which this implied power would attach, and we have not been able to find such clause. Indeed, this argument has not been urged before us.

One of the causes assigned in the demurrer to the complaint, is, that it contains no averment "that the Montgomery and Wetumpka Plank-Road Company ever received the proceeds of said bonds or any of them." Both the complaint, and the bond declared on, show that the city council of Montgomery "*hath loaned*" to the plank-road company bonds to the amount of twenty thousand dollars. The plank-road company having received the bonds, if those bonds were in a condition that they could not be made available, the question should be presented by a proper plea. We cannot presume such to have been the case.

The demurrer also asserts, that the bond declared on was given upon an illegal consideration. What was the consideration of the bond? Evidently, twenty thousand dollars of the bonds of the city of Montgomery. We think it clear that there are purposes for which the city could issue its bonds. In fact, the act "to amend the charter of the city of Montgomery," approved February 2, 1856, expressly authorized the city council to raise a sum of money not exceeding seventy-five thousand dollars, by the sale of the bonds of said city for that amount. Neither the bond declared on in this case, nor any part of the pleadings in the cause, informs us that the bonds which were the subject of this loan were issued for a purpose not authorized by law. In the absence of all averment, showing that the bonds were *issued* for an unauthorized purpose, we cannot presume that the bond under discussion was given on an illegal consideration.

The legality of the issue of those bonds, and the liability of the city for their redemption; and, as affecting this last inquiry, the question whether the bonds are in the hands of first or subsequent holders,—will, perhaps, present grave questions, should they arise. None of them

are presented by this record, and it would be improper in us now to consider them.

But the demurrer raises another question: namely, the power of the city council to make the contract declared on, and to maintain an action for its breach. In our opinion, the latter inquiry is dependent on the former. In other words, we think it clear that, if the city council had no authority to have the work done which the bond requires the defendants to perform, no action can be maintained by the former for the breach of the contract. We base this, not on the want of consideration to support the contract; on the contrary, the same rule would prevail if the city had paid out gold and silver as the consideration for the bond. It rests on the naked want of authority in the city to have the work done; and this want of authority, if it exist, renders the bond invalid. We think these results flow inevitably from the principles above settled.

It may be contended that, although the bond declared on is invalid so long as the city bonds remain in the hands of the plank-road company, yet, when that company negotiates the bonds, and in this way, as it is contended, fixes a liability on the city for their redemption, then the consideration of the bond becomes complete, and a right of action upon it accrues to the city council. We confess our inability to perceive the force of this argument. The general rule is, that contracts depend for their validity on the facts of the case as they exist when it is entered into. With the exception of a few cases dependent on peculiar circumstances, we know of no rule by which a contract which is invalid at the time it is entered into can become binding by the happening of any subsequent event. At all events, we cannot admit that a subsequent sale of the city bonds by the plank-road company, can have the effect of supplying the want of power in the city authorities to make the contract.

The contract in this case purports to bind the obligors to apply the proceeds of the city bonds faithfully to the completion of the Montgomery and Wetumpka plank-road, and the building of a bridge over the Tallapoosa

river; the work to be completed by the first day of March, 1853. The breaches assigned are, that the road has not been completed, and the bridge has not been built. The question arises, had the city council authority to contract to have these works done? We judicially know that no part of the Tallapoosa river is within the corporate limits of the city of Montgomery; and so far as the contract declared on binds the defendant to build the bridge across the Tallapoosa river, we hold that no recovery can be had. The charter of the Montgomery and Wetumpka Plank-Road Company is not brought before us, and we cannot learn the *termini* or route of that road, further than the names of the places Montgomery and Wetumpka indicate the same. Whether any, and if any, what portion of the road is intended to be within the corporate limits of the city of Montgomery, we do not know.

It is a clear proposition, that the corporation of the city of Montgomery has authority to improve the streets and highways within its limits. It may make valid contracts to have these works performed. There is nothing on the face of this bond, or in the complaint, which shows that said road, or at least a portion of it, is not within the city of Montgomery, and, therefore, under the jurisdiction of the city authorities. On demurrer, we do not think the court was authorized to presume such was not the case; but, on the contrary, in the absence of anything apparent on the pleadings, or in the contract, showing such to be the case, we think the court should rather have presumed that the city council, in making said contract, did not transcend its powers.

This case, then, presents the question of a contract or promise, based, so far as we are informed, on a good and valuable consideration, to do and perform certain works, a part of which the city of Montgomery had authority to contract for, and a part of which was without the pale of their powers. In such case, is the contract invalid in *toto*, or is it valid in part, and invalid in part? Where a bill of exchange was accepted, to secure the payment of a sum of money, consisting partly of a debt from which the acceptor had been discharged under the insolvent debtor's

act, and partly of a new debt, it was held, that the bill was a valid security as to the latter, although it was void as regarded the former debt.—See the authorities to this effect collected in Addison on Contracts, (2d Am. ed.) 147–8. So, a contract, on a valuable consideration, not to engage in a particular trade in London or Westminster, or within six hundred miles thereof, was held binding as to London and Westminster; but, as to the six hundred miles, it was held void, because it was in general restraint of trade.—See Price v. Green, 16 Mees. & Wels. 346; Doe v. Pitcher, 6 Taunt. 359; Grand Gulf Bank v. Archer, 8 Sm. & Marsh. 151. We think these authorities are decisive of the question we are considering; and that, if any of the work which the contract required the obligors to perform was within the city of Montgomery, the bond, to the extent of the damages sustained from that breach, was and is recoverable. This question cannot be determined absolutely without inspecting the charter of the Montgomery and Wetumpka Plank-Road Company. That being a private corporation, and its charter not brought before us, either in the pleadings or proof, we cannot look to it in determining these questions.

It is further urged in favor of the maintenance of this action, that inasmuch as the plank-road company has had the benefit of the city bonds, and obtained them on the faith of the contract which is the subject of this suit, the obligors in this bond should be held estopped from disputing the authority of the city to make the contract. If this doctrine be established, then corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them which the legislature have withheld. A proposition so erroneous can scarcely need argument to overturn it.—See, on this point, Penn., Del. & Md. Steam Nav. Co. v. Dandridge, 8 Gill. & J. 248, 319–20, and authorities cited; Albert v. Savings Bank of Baltimore, 1 Md. Ch. Dec. 407–13; Smith v. Ala. Life Ins. & Trust Co., 4 Ala. 558; Hodges v. City of Buffalo, 2 Denio, 110; Life & Fire Ins.

Co. v. Mechanics' Fire Ins. Co., 7 Wend. 31; N. Y. Firemens' Ins. Co. v. Ely, 5 Conn. 560. It will be remembered that, in this case, it is the corporation itself which sues. The suit is an attempt to enforce a contract which the corporation had no authority to make, save as above indicated. We cannot apply the doctrine of estoppel to such a case as this. It is not necessary that we should now go further.

For the reason above stated, the judgment of the circuit court is reversed, and the cause remanded.

RICE, C. J., dissenting.

PARKER'S EXECUTOR *vs.* LAMBERT'S ADM'RS.

[ACTION AT LAW AGAINST EXECUTOR OF FEME COVERT.]

1. *Contract of feme covert, living separate from her husband, and owning separate estate.*—A married woman, owning a separate estate by deed, and living apart from her husband by agreement with him, could not, at common law, make any contract upon which either she or her personal representative could be sued at law; and this principle of the common law is not affected by any statutory provisions of this State.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by the administrators of Mrs. Elizabeth Lambert, deceased, against the executor of Mrs. Bethany Parker, deceased; and was commenced in March, 1854. It was founded on several promissory notes, fourteen or fifteen in number, for less than $50 each, amounting in the aggregate to about $600, all dated 11th May, 1852, executed by Mrs. Parker, and payable to Mrs. Lambert. The only plea was the general issue, with leave to give any special matter in evidence. The evi-

dence adduced on the trial, as appears from the bill of exceptions, showed that these notes were given in consideration of board and lodging furnished to Mrs. Parker, who was a married woman, living separate and apart from her husband by agreement between them; and it appeared that, at the time the notes were given, Mrs. Parker owned a separate estate, by deed from her husband, of which Joseph D. Hopper was trustee. The court charged the jury, "that if they believed from the evidence that Mrs. Parker, at the time of the making of said notes, was a married woman, and so continued until her death, and that her husband was living at that time, this would not defeat the plaintiff's right of recovery, if they also found from the evidence that, at the time she made the notes, she was living separate from her husband under an agreement so to do, and that she then had a separate estate which, at her death, came into the hands of the defendant." The defendant excepted to this charge, and he now assigns it (*inter alia*) as error.

L. E. Parsons, for the appellant.

Wm. P. Chilton, and Morgan & Martin, *contra.*

RICE, C. J.—One of the general rules of the common law is, that a married woman has no power or capacity to contract, so as to authorize a judgment to be rendered against her personally, either by a court of law or a court of equity, on a contract made by her during coverture. To this general rule there are exceptions; but the facts which constitute the hypothesis of the first charge given by the court below, do not bring the present case within the exceptions. Upon such a state of facts as supposed in that charge, the capacity of the wife to bind herself by a contract made during the coverture, so as to authorize either her or her executor to be sued thereon *at law*, is untouched and unaffected by any of our statutory provisions. By such contract, she may charge her separate estate, and authorize a court of equity to enforce it as such a charge; but a court of law cannot enforce such a contract, either against her or her personal representa-

tive, although she has a separate estate, unless such facts are proved as to bring the case within some exception to the general rule of the common law hereinabove stated. Chitty on Contracts, (edition of 1851,) 168, 171; Gibson v. Marquis, 29 Ala. 668; Rowland v. Logan, 18 Ala. 307; 2 Bright on Husband and Wife, 249, 255.

It is fully settled, that a husband and wife cannot, by a deed securing a separate and sufficient maintenance to her, dissolve the relation of marriage, so as to enable her, even whilst living apart from him, and enjoying such separate fund, to contract as a *feme sole*.—Marshall v. Rutton, 8 T. R. 545; and authorities cited *supra*.

For the error in the first charge given by the court below, we are compelled to reverse the judgment, and remand the cause; and we deem it proper not to pass directly upon the other questions presented on the record, but to leave them untouched for the present.

Judgment reversed, and cause remanded.

DAUGHDRILL *vs.* ALABAMA LIFE INSURANCE AND TRUST COMPANY.

[TRESPASS AGAINST TAX-COLLECTOR.]

1. *Theory of incorporations.*—In theory, the peculiar privileges of corporations are conferred upon them, by contract with the State, in consideration of the public benefit which will result from their operations; and the fact that, in the hurry of legislation, the privileges conferred sometimes greatly exceed in value the benefits accruing to the public, is not a matter for the consideration of the courts, in determining the validity of a grant of powers which will, *prima facie*, exert a beneficial influence on the commerce, trade, and mercantile interests of the country.
2. *Constitutionality of clause in charter of private corporation providing for commutation of taxes.*—A provision in the charter of an incorporated insurance company, establishing a fixed bonus in commutation of all taxes on its capital stock and property, is not obnoxious to any constitutional objection.
3. *Private acts not repealed by Code.*—By virtue of the exception contained in section 10 of the Code, a clause in the charter of an incorporated insurance company, providing for a commutation of its taxes, is not repealed by section 391, regulating the assessment of taxes.

APPEAL from the Circuit Court of Mobile.
Tried before the Hon. C. W. RAPIER.

THIS action was brought by the appellee, a corporation chartered by the legislature of this State, against James H. Daughdrill, "to recover damages for wrongfully taking three mahogany writing-desks, the property of plaintiff," which the defendant had seized, as tax-collector of Mobile county, to satisfy the county taxes for the year 1853, which the plaintiff refused to pay. It was submitted to the decision of the court on the following admitted facts: "The plaintiff is a corporation, chartered by the legislature of this State.—See the act, with amendments thereof. The defendant is the tax-collector of Mobile county. In the year 1853, the tax-assessors of said county assessed the capital stock of said company, actually paid in and liable to taxation, at $200,000; the county tax on which, if liable to taxation, amounts to more than the value of the desks for the taking of which the action is brought. The plaintiff refused to pay any county tax. The county taxes were demanded by the defendant, but his demand was refused. Therefore, long after the 1st Monday in December, 1853, to-wit, on the 2d Monday in December, 1854, he seized and distrained said desks on account of said county taxes. If, on these facts, the plaintiff is entitled to recover, the value of the desks is admitted to be $51; and if the plaintiff is not entitled to recover on these facts, then judgment is to be rendered for the defendant. This agreement may be at any time amended, so as to raise the question directly whether the plaintiff is liable to pay county tax on its capital stock or any of its property."

On these facts, the court rendered judgment for the plaintiff; and its judgment is now assigned as error.

The material portions of the appellee's charter are copied into the opinion of the court.

P. HAMILTON, E. S. DARGAN, and JOHN HALL, for the appellant, made these points:—1. The right of taxation is a part of the sovereign power, and is not to be taken away

or diminished by mere implication: the waiver of the right must be by express language.—Stein v. Mayor of Mobile, 17 Ala. 239; Same v. Same, 24 Ala. 611; Providence Bank v. Billings, 4 Peters, 514; Charles River Bridge v. Warren Bridge, 11 Peters, 420; Bank of Pennsylvania v. Commonwealth, 19 Penn. St. (7 Harr.) R. 150; Easton Bank v. Commonwealth, 10 Barr, 451; Brewster v. Hough, 10 N. H. 138. At the time when the appellee's charter was granted, the right to tax for county purposes was vested in the commissioners' courts of the several counties; and has been held to have been rightfully so bestowed.—17 Ala. 234. In this state of things, the exemption claimed by the appellee, if valid at all, applies only to the State tax, and cannot be extended to the county tax.

2. If a more extended meaning be given to the language, the effect will be to make provisions inconsistent with the constitution. The first section of the bill of rights forbids the granting of exclusive privileges and emoluments, except in consideration of public services. The laws must operate equally on all citizens.—2 Yerger, 554; 5 Yerger, 320; 3 Greenl. R. 326–36. They cannot be suspended in favor of an individual.—11 Mass. 396, 404. By what right can the legislature exempt the capital of this corporation—that is, the property of its stockholders, one portion of the citizens of the State—from bearing its share of the public burdens? The property of all the other citizens of Mobile is taxed, to provide for the poor, to keep up roads and bridges, and to maintain the administration of the laws; from all which burdens the appellee's property is exempt, under the construction of its charter for which it contends. Such a construction would defeat the equal operation of the tax laws, and is against the spirit and letter of the constitution.

3. It is no answer to this to say that the State has so contracted. The power of the State to contract is limited. It cannot contract to disregard the constitution. If it transcend that limit, the contract is void. The power to contract at all in regard to its sovereign rights is doubted, and for very grave reasons.—Brewster v. Hough, 10 N. H.

138; Debolt v. Ohio Life Ins. & Trust Co., 1 Ohio State R. 564; Toledo Bank v. Bond, *ib.* 628; Knoup v. Piqua Bank, *ib.* 604; Plank-road Co. v. Busted, Law Register for February, 1856. Notwithstanding such contract, the subject still remains within the power of the legislature; and the effect of sections 391 and 776 of the Code is, to do away with the laws under which the appellee claims.

ROBERT H. SMITH, *contra.*—1. The State has not attempted to tax the appellee, otherwise than as provided by its charter. The Code is to be construed as a single statute, so that all its parts may have effect, and harmonize with each other. Section 391, providing for the assessment of taxes, is to be construed in connection with section 10, which expressly exempts from repeal all private acts of incorporation. The county tax is a per-centage on the State assessment, and an incident to it. The county taxes what the State assesses, and what the State does not assess the county cannot tax. The county tax is a per-centage, not on the State tax, nor on all sources of State revenue, but on the State assessment. A bonus, paid by a corporation, may be in the nature of a tax, but is in no sense an assessment, as the word is defined by Bouvier.

2. If the legislature had attempted to tax the appellee, otherwise than as provided in its charter, the law would have been void, because violative of the constitutional provisions respecting laws impairing the obligation of contracts. The charter is a contract with the State, as has been settled, after full argument and consideration, by numerous decisions of the supreme court of the United States, and by other high judicial tribunals.—Dartmouth College case, 4 Wheaton, 125; Piqua Branch Bank v. Knoup, 16 How. (U. S.) 416, 427; 3 How. (U. S.) 133; 3 J. J. Mar. 598; 2 Hawks, 10; 13 Iredell, 75; 11 Iredell, 558; 9 Yerger, 490; 2 Murph. 266. In these cases, it will be observed, the question is considered with direct reference to the taxing power as a part of the political sovereignty of the State. The doctrine of Mr. Justice Catron, in the case cited from 16th Howard, might always

be made a ready pretext for violating the plighted faith of the State, and may be called the parent of repudiation.

3. The contract is not violative of any provision of our State constitution. The 1st section of the bill of rights, on which the constitutional objection is predicated, was intended to inhibit the establishment by the State of sinecures or privileges such as are appendages to an aristocratic government. Similar provisions are contained in the constitutions of North Carolina, Tennessee, Kentucky, and other States. It is always for the legislature to determine, in conferring exclusive rights or privileges on persons, natural or artificial, how far the benefit resulting will be a public service; and the courts cannot look behind the action of the legislature. If this were not so, numerous acts of incorporation would be void; indeed, almost every charter contains a grant of exclusive privileges, conferred, not for any direct public services to be rendered, but because the corporation, in the opinion of the legislature, though established solely for private advantage, will indirectly prove to be a public service. The same objection would apply to laws exempting persons from jury duty. This argument has been considered, and answered on these grounds, in the following cases: Yadkin Navigation Co. v. Benton, 2 Hawks, 13; Patterson v. Trabue, 3 J. J. Mar. 598; Bank of Newbern v. Jas. Taylor, 2 Murph. 266; 1 Carolina Law Repository, 246. See, also, 17 Ala. 234; 24 Ala. 591.

4. But the provision in the appellee's charter, respecting the commutation of taxes, is in no sense a privilege: it is a burden, an exaction, which is required to be enforced in the most rigid manner. When it was laid, the State levied no taxes, but supported the government from the profits of banking. The appellee has thus paid, not only a direct consideration to the public, but one highly advantageous to the State.

WALKER, J.—The 16th subdivision of section 391 of the Code subjects corporations, created by the laws of this State, and not exempt under section 390, to a tax of 25 cents on each hundred dollars of the capital stock actually

paid in. Section 776 of the Code authorizes the levy of a tax for county purposes, not exceeding one hundred per cent. upon the State assessment. The tax levied upon the corporation, which is the appellee here, did not exceed one hundred per cent. on what would have been the State tax, had it been assessed; and that corporation is not one of the institutions exempted from taxation by section 390. The appellee is, therefore, liable to taxation, unless an exemption is provided by the charter.

The Alabama Life Insurance & Trust Company was chartered on the 9th January, 1836. The 22d section of the charter provides as follows: "As a full commutation for all taxes, impositions, or assessments on the capital stock of said company, or on any of its property or effects, the said company, during the continuance of its charter, shall pay annually, on the first Monday in December in each year, to the treasurer of the State, for the use of the people thereof, the sum of two thousand dollars." Section 25 of the same charter contains the following words: "This act shall continue and be in force, *unalterable by the general assembly* without the consent of the trustees of the said company, for and during the term of twenty years, and no longer." The capital stock of the company was originally one million of dollars, but was subsequently reduced; and a corresponding reduction was made in the bonus to the State.

The questions which have been argued in this case, are as follows: 1st, whether an act discriminating in the imposition of taxes, in favor of a corporation, is constitutional; 2d, whether the legislature has passed any law for the repeal of the provision of the charter in reference to the commutation of taxes; 3d, if such an act has been passed, whether it is constitutional.

It is argued for the appellant, that a law which confers upon a corporation the privilege of paying a specific sum, as a commutation of, or, in other words, in exchange or barter for all taxes, contravenes that clause of the first article of the State constitution, which says that "no man or set of men are entitled to exclusive, separate, public emoluments or privileges, but in consideration of public ser-

vices." We shall not controvert the proposition, that the discrimination in favor of any single natural or artificial person in the imposition of taxes would be tantamount to conferring an exclusive separate public privilege. During a portion of the corporate existence of the appellee, the State exacted no taxes from its citizens; during another portion of its existence, the State has exacted taxation from the people of the State generally, in a heavier proportion than is exacted from this corporation under the commutation feature of the charter. If we look at the commutation as extending through the entire corporate existence, it would seem that such an exchange of the annual tax, accommodated in its amount to the varying necessities of the State by the judgment of successive legislatures, for a fixed annual sum, would be a privilege or burden, according as the aggregate amount paid the State might be less or greater than the aggregate of the tax during the same period. If we contrast the commutation with the tax for the particular year 1853, it would seem that the commutation is a privilege, because the tax would have exceeded for that year the amount paid as a commutation. We do not determine in which light it is proper to regard the question; because, conceding that the commutation is a privilege, within the intendment of the constitution, we decide the question of the constitutionality of a commutation of taxes in favor of this corporation, adversely to the appellant.

Every corporation is invested with privileges which distinguish it from natural persons, and do not pertain to the people generally. The perpetuity, right of succession, and of suing and being sued in a corporate name, and of exemption from liability on the part of the corporators to its debts beyond their stock, are privileges characterizing almost all corporations. A still higher privilege is that, conferred upon all companies organized to build roads, of subjecting private property to their use, upon making compensation. The conferring of none of these or the like privileges has ever been supposed to involve an infringement of the constitutional provision as to exclu-

sive privileges. If it did, every act of incorporation ever granted in the State would be void.

The theory of corporations is, that the privileges are conferred upon them in consideration of public benefit which will result from their operations. The production of such benefit constitutes the "public service" for which the constitution permits the grant of peculiar privileges. It is said in Blackstone's Commentaries, 467: "It has been found necessary, when it is *for the advantage of the public* to have any peculiar rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality." "The public *benefit* is deemed a sufficient consideration of a grant of corporate privileges."—Angell & Ames on Corporations, § 13.

In the case of Currie's Adm'rs v. Mutual Ins. Society, 4 H. & M. 315, Judge Roane, of Virginia, used the following language: "With respect to acts of incorporation, they ought never to be passed, but in consideration of services to be rendered the public. This is the principle on which such charters are granted, even in England; and it holds *a fortiori* in this country, as our bill of rights interdicts all 'exclusive and separate emoluments or privileges from the community, but in consideration of public services.' It may be often convenient for a set of associated individuals to have the privileges of a corporation bestowed upon them; but, if their object is *merely private* or selfish, if it is detrimental to, or not promotive of the public good, they have no adequate claim on the legislature for the privilege."

This court expressed the same idea in the old case of Aldridge v. Tuscumbia Rail-road Company, 2 Stew. & Por. 211: "Whenever the State grants a charter of incorporation, it is always presumed that she receives for it some equivalent; that the grant is not without a *quid pro quo*." See, also, Dartmouth College v. Woodward, 4 Wheat. 637; Toledo Bank v. Bond, 1 Ohio State R. 622, 642; Dale v. Governor, 3 St. 387; 1 Domat on Civil Law, 566.

The principle upon which the bestowment of those

privileges is harmonized with the constitution, is, that they are the result of contract between the corporation and the State. The public service to be done by the enterprise, in which the corporation is engaged, is the consideration upon which the State enters into the contract. The constitutional power of the legislature, to grant the privilege under consideration, cannot be distinguished from those other privileges which are so frequently conferred upon corporations without a question of their validity.

In the hurry of legislative proceedings, it cannot be doubted that mistakes are committed, and that peculiar privileges are sometimes conferred upon corporations which yield no fruit of public utility commensurate in value with the bestowment upon them. But where, as in the case of this insurance company, the powers conferred are, *prima facie*, such as will in their exercise operate a wholesome and beneficial influence upon the commerce, trade, and mercantile interests of the country, it is not the province of the judicial tribunals to revise the judgment of the legislature, as to the measure of public utility likely to result from the corporation. It is a matter determinable by the judgment, and involves the exercise of calculation and intelligence. The correct decision of the question as to the adequacy of the consideration which the usefulness of a corporation will afford for the privileges conferred, depends upon an intimate knowledge of all the great interests of the State, moral, social, educational, agricultural, commercial, mining, and mechanical, and an enlightened perception of the effect upon them of specific enterprises. It is improper, and impossible in the nature of things, that errors of the legislature in such a matter should be the subject of judicial cognizance.—President & Directors of the Bank of Newbern v. James Taylor, 2 Murph. (N. C.) 266; Patterson v. Trabue, 3 J. J. Marsh. 598; Yadkin Navigation Company v. Benton, 2 Hawks, 13; Hazen v. Union Bank, 1 Sneed, 115.

For the reasons which we have given, we do not regard a law unconstitutional which provides for the payment of

a specific sum in lieu of all other taxes by a corporation, the purposes of which are, *prima facie*, such as will benefit the public.

The provision in the charter of the appellant for the commutation of taxes, being a constitutional law, must remain the law until it is repealed. If the commutation feature of the charter be repealed, it is done by the Code. Section 391 of the Code, if construed without reference to the rest of that book, would undoubtedly repeal, by virtue of its repugnancy, the section of the charter which prescribes the bonus to be paid to the State. But section 10 of the Code expressly continues in force all special acts, or joint resolutions of the general assembly, in force at the adoption of the Code, incorporating companies for banking or manufacturing purposes, for the purpose of making roads, canals, or bridges, and for marine and fire insurance, or for any other purpose. The act of incorporation in this case is clearly within this list of laws preserved from repeal, and is, therefore, unrepealed, if it was in force at the adoption of the Code. Where the legislature, by the 10th section of the Code, preserved from repeal the act of incorporation under a comprehensive term, it must be understood that all parts of the act then unrepealed were continued in force. The part of the charter fixing the annual sum to be paid by the corporation, being continued in force by the Code, must be regarded as an exception to the general law embodied in section 391. It is only by so regarding it, that full effect can be given to section 10; and we must construe the law so that all parts of it may stand.

The general acts before the adoption of the Code, on the subject of taxation, are not such as will repeal the previous special law contained in the charter.

Until the legislature shall pass an act for the repeal of the commutation feature of the charter, the question of legislative power to make that feature irrepealable does not arise. Until the question shall, by such a repealing act, be raised and presented to us, we decline to pass on it.

The judgment of the court below is affirmed.

HENDERSON *vs.* RENFRO.

[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *Administrator's liability for hire of slaves.*—An administrator is not chargeable, on settlement of his accounts, with the full value of the hire of a slave belonging to his intestate's estate, whom, on account of his ill health, he did not hire out, when it is shown that he acted under the advice of a physician; nor with the hire of other slaves for a small portion of the year, when it is shown that he made unsuccessful efforts to hire them out for that time, and that they were employed during the time in repairing the fences &c. on the plantation, which it was his duty to rent out; nor with any loss which may ensue from the private hiring of slaves, (Code, § 1751,) unless he is shown to have acted in bad faith.
2. *Presumption in favor of judgment.*—The rule is well settled, that all reasonable presumptions will be indulged in favor of the judgment of the primary court, and that error must be affirmatively shown.
3. *Costs of contested items of account.*—The costs of the attendance of a witness, summoned to testify in relation to a contested item with which the administrator is sought to be charged under section 1824 of the Code, are within the enlightened discretion of the primary court, although he is also summoned to testify in relation to another contested item of credit (§ 1814) which is reduced.

APPEAL from the Probate Court of Talladega.

IN the matter of the estate of Edward Henry, deceased, on final settlement of the accounts of Thomas P. Renfro, sheriff, and, *ex officio*, administrator *de bonis non*, with the will annexed, of said decedent. All the assignments of error relate to the rulings of the primary court on the allowance of several items of the administrator's accounts, which were contested by John Henderson, the succeeding administrator, and which may be thus stated:

Henderson moved the court to charge said Renfro with the hire of certain slaves belonging to the estate, with which he had failed to charge himself; to-wit, with the hire of a boy named Jack, for the year 1855, and with the hires of Wash, Manuel, Ann, and Betsey, from the 1st January to the 5th February, 1855. In support of this motion, L. R. Lawler and George Elrod were examined

as witnesses, whose testimony was as follows: "Lawler proved, that he lived in the year 1855 on a place belonging to said decedent, with one James W. Simmons, who had rented said place for the year; that he assisted in making a crop on said place; that the slaves above-named were brought on said place early in the month of January, and remained there until some time early in February; that they were engaged all the time in repairing the houses and fences on said place, making a garden, &c.; that Jack remained with Simmons during that year, and witness worked with him on the place; that said boy was a constant hand on the farm during the year, except some two or three fractions of days, but, in consequence of a sore on his ancle, he usually worked with a hoe, or did some other light work, and did not plow any; that said boy's services for that year were reasonably worth $50; that the hire of Wash and Manuel, for said month of January, was worth from $6 to $8 per month, and for the other five days in proportion; that Ann's hire for said month was worth from $4 to $6, and the girl Betty's from $3 to $4. Elrod proved, that he was acquainted with said slaves, and had been in the habit of hiring them before that year as the agent of the former administrator; that he had hired out the boy Jack, for the year 1854, for $150, and had been offered, by private contract, $300 for the boy Jack and another boy belonging to the estate, for the year 1855; that he notified said Renfro of this offer, who refused to take it, or to hire them privately, and said that he was going to hire them at public outcry; that the hire of Jack for the year 1855, in his then condition, was worth at least $100; that the hire of Wash and Manuel, for said month of January, was worth from $10 to $12, and in the same proportion for the five days in February; that Ann's hire for the same time was worth from $6 to $8 per month, and Betsey's from $4 to $5 per month. To all the evidence of said Lawler and Elrod Renfro excepted."

"Said Renfro then introduced said James W. Simmons as a witness, who had had possession of said slaves as above shown. Henderson objected to the competency of

Simmons as a witness, on the ground of interest, and asked for what purpose he was introduced. It was thereupon stated, that he was introduced for the purpose of showing that Renfro had requested his aid in hiring out said slaves in the early part of the year 1855, until he could advertise and hire them out publicly; that witness did so, but could not find any one who wished to hire for that length of time; that Renfro afterwards told him that he could not hire out said slaves until he could advertise and hire them publicly, and that he would have to charge the estate for their board if he kept them until that time; that he (Renfro) learned that the farm was in a bad condition to rent, and if witness would take said slaves, and relieve the estate from the expense of their board until the day of hiring, and repair said place, and put it in a condition to rent, (which witness did,) that he should be allowed such compensation for his services in repairing said farm and houses as the probate court would allow him. Henderson then objected to said witness, on the ground that he was interested, and to the testimony proposed to be given, as illegal and irrelevant; but the court overruled the objections, and said Henderson excepted; and the witness then testified, in substance, as above stated."

"Said Renfro then read in evidence the deposition of Dr. J. W. Watkins," who testified, in substance, that in the early part of the year 1855, at the request of said Renfro, he examined the boy Jack, and prescribed for him; that the boy was afflicted with a diseased leg, ulcerated about the ancle-joint; that the ulcers were of a chronic character, proceeding from some disease of the contiguous bones, and did not yield readily to medical treatment; that the limb might be used without pain, but "required absolute rest to be cured"; that it would have been very imprudent to hire out said boy while in that condition, or to bind him to constant labor, and would probably have endangered his diseased limb, if not his life; and that he gave Renfro a written statement of his opinion on the case. Renfro then introduced a practicing attorney as a witness, who testified that, in the early part

of the year 1855, Renfro showed him a certificate from Dr. Watkins, relative to the health and condition of the boy Jack, and asked his advice about hiring the boy; and that he advised Renfro, after reading the certificate, not to hire out the boy, as he might be held liable to the estate in the event of his loss. "There was no evidence going to show that Simmons was required to pay hire for Jack, or whether he was to make him work or not. This was all the evidence, on both sides, with regard to said motion; and thereupon the court charged said Renfro $50 for the hire of the boy Jack, but refused to charge him more, and also refused to charge him with any amount for the hire of said other slaves; to which rulings of the court said Henderson excepted."

The first item of the administrator's accounts, to which said Henderson objected, was voucher No. 1, an account in favor of James W. Simmons amounting to $279 50, principally for work done in repairing the houses and plantation of the estate. On the evidence adduced relative to this item, the court reduced the amount to $217 75; and to the allowance of this sum, as a credit to the administrator, said Henderson excepted.

The other items of credit to which objections were made, were for three witness-certificates paid by Renfro, amounting to $12 50. In relation to these items of the account, "it was admitted that said witnesses were subpœnaed on the part of said Renfro, for the purpose of being examined as witnesses with regard to voucher No. 1 on this settlement, and to rebut the motion of said Henderson to charge said Renfro with the hire of said boy Jack, and for the purpose of sustaining said voucher as a credit; and that said voucher was reduced by the court $61 75." This was all the evidence with regard to said vouchers; and thereupon the court allowed said Renfro a credit for each one of said vouchers, and said Henderson excepted.

Henderson & McGee, for appellant.
James B. Martin, *contra.*

STONE, J.—We do not think this record discloses any error available to the appellant.

Under the testimony of Dr. Watkins, we think it extremely doubtful if the boy Jack should have been permitted to do any labor during the year 1855. After the opinion of the physician was obtained, it would have been highly improper to hire him out, irrespective of his health. If he had been so let to hire, and injury to him had been the consequence, we will not say the administrator would have rendered himself liable. Administrators must be clothed with some discretion in the management of the property of the estate committed to their charge; and if they employ the same skill and care as an ordinarily prudent man would employ in reference to his own property, they should not be held accountable. The testimony of the witnesses who had the best opportunity of knowing the facts, did not place the value of Jack's services above the sum fixed by the probate court; and that court did not err in this particular.

As to the hire of the slaves during the month of January, and up to the first Monday in February, 1855, the record does not disclose enough to show that the administrator should have been charged for it. There was in this estate a will. What its provisions are, we do not know. Neither does it appear from this record that the estate was in a condition to be settled up, even if the will was silent on the question. From anything that appears, it may have been the duty of the administrator to rent out the land during that year; and we think the law requires us to presume, in favor of the ruling of the primary court, that such was his duty. The proof shows the real estate was greatly in need of repairs; and we do not doubt the authority of the administrator, whenever it is his duty to rent out land, to put upon it such reasonable repairs as are necessary to make it command fair rent. See Pinkard v. Pinkard, 24 Ala. 250; Gerald v. Bunkley, 17 Ala. 170; 2 Story's Equity, § 1269. In this case, there is no proof that the administrator could have hired out the slaves for the short period which would elapse before the day of public hiring; but, on the contrary, the

proof tends to show that he made efforts to do so, and did not find a hirer. Under these circumstances, we think he deserves commendation for employing the slaves in repairing the plantation, and thus relieving the estate of the expense of their board.

It may be contended on the other side, that inasmuch as the administrator obtained an allowance for repairs put on the plantation by Simmons, and inasmuch as part of those repairs were put there by the slaves of the estate, the administrator should have been charged for their hire. The record does not inform us that any allowance was made for the labor performed by these slaves. On the other hand, it does appear that the account for repairs was materially reduced. We think we would do no violence to the established facts in this record, by presuming that this reduction was made on account of the labor of the slaves of the estate. At all events, we do not feel at liberty to presume that any of said allowance was for labor performed by them. If such was the fact, it should have been expressed in the record. The rule is too well established to be further a subject of debate, that this court will indulge all reasonable presumptions which the record will allow, in favor of the ruling of the court below. Error will not be presumed, but must be affirmatively shown.—School Commissioners v. Godwin, and authorities cited, 30 Ala. 242.

Under our statute, the administrator is authorized to hire out the slaves either publicly or privately.—Code, § 1751. This section leaves it optional with him which course he will pursue. Having himself the option, of course he will not be accountable for loss that may result, unless it be shown he acted in bad faith.

The principles above stated dispose of the first and second assignments of error. The third assignment presents more difficulty. The item, voucher No. 1, charged by the administrator, was reduced. In such case, the Code (§ 1814) declares, that the costs of the contest must be paid by the administrator. James Martin, David Martin, and Alex. Hill, were witnesses in reference to that voucher; and the third assignment of error questions

the propriety of the decision of the probate court, which allowed to the administrator a credit for the fees of those witnesses. If the question rested alone on these propositions, we should unhesitatingly declare that the probate court erred in this allowance. But the question is not thus simple. The bill of exceptions recites, that these witnesses were all summoned on the part of said Renfro for the purpose of being examined as witnesses with regard to voucher No. 1, "and as witnesses to rebut the motion of said Henderson to charge the said Renfro with the hire of said negro Jack." The motion to charge Renfro with the hire of the slave Jack, was made under section 1824 of the Code; and the Code gives no special direction as to costs on a motion made under this section. The costs in such case must be held to be within the enlightened discretion of the probate court. Now, these witnesses were summoned for two objects. If the expenses of their attendance be divisible, so far as they were witnesses for one object the administrator was liable for the expense; and as to the other object, the expense was within the discretion of the court. The statute has made no provision for such a case as this; and we know of no rule of law which will allow us to travel beyond the statute, and divide the costs. Even if we were to undertake such division, no rule has been furnished to us, nor can we conceive of any, which would enable us to adjust the proportions. In such case, we think it must be left to the decision of the primary court, before whom the trial takes place. If he tax the administrator with the costs, as properly pertaining to the contested item, which he reduces; or, if he charge the costs against the estate, as pertaining to the effort to charge the administrator under section 1824,—in either case, we think his judgment is free from any error which can be taken advantage of in this court.

The judgment of the probate court is affirmed.

WALKER, J., not sitting.

THOMASON *vs.* ODUM.

[DETINUE FOR SLAVES.]

1. *Charge referring legal question to jury.*—A charge is erroneous which refers to the jury the determination of the question how far parol evidence is inconsistent with a record.
2. *What constitutes record in arbitration case.*—When a pending suit is submitted to arbitration without an order of court, under an agreement that the award shall be made the judgment of the court, the submission and award do not constitute a part of the record, unless so made by order of the court, and identified.
3. *Implied waiver of objection to illegal evidence.*—The failure to object to the admission of evidence, or to move its exclusion, is an implied waiver of all objections to its admissibility.
4. *Form and effect of judgment of retraxit.*—A judgment of *retraxit*, which is as complete a bar as a judgment on verdict, can only be entered by the plaintiff in person; but a recital in the judgment entry, that "the parties came by attorney, and the plaintiff enters a *retraxit*," sufficiently shows that the *retraxit* was entered by the plaintiff in person.
5. *Conclusiveness of judgment in trover.*—A judgment on verdict in trover, in favor of the defendant, is conclusive on the plaintiff, in an action of detinue instituted by him against one claiming under said defendant, if the judgment was rendered before the defendant parted with the property, unless the plaintiff claimed in the detinue suit on a title acquired after the rendition of such judgment; *secus*, if the trover suit was commenced after the defendant therein had parted with the property, which afterwards came by regular transfers to the defendant in the detinue suit.
6. *Former recovery.*—A former recovery in trover, with satisfaction thereof, is a bar to an action of detinue against one claiming under the defendant, either before or after the rendition of such judgment.
7. *Admissibility of parol evidence to affect record.*—Parol evidence cannot be received to vary or contradict a record; but, where the record does not show on what ground the judgment was rendered, the deficiency may be supplied by parol.

APPEAL from the Circuit Court of Conecuh.
Tried before the Hon. ANDREW B. MOORE.

THIS action was brought by Matthew D. Thomason against Aaron Odum, to recover a negro woman named Watsey, together with her three children; and was commenced in April, 1849. It was before this court at its June term, 1853, and is reported in 23 Ala. 480. The

pleadings in reference to the statute of limitations of Florida, which was set up by the defendant, were carried to a sur-rejoinder; but no question seems to have arisen about them on the last trial. The confused state of the record renders it impossible to present an intelligible statement of the facts, except so far as they may be gathered from the bill of exceptions, which is as follows:

"Be it remembered, that this cause came on to be heard at this term. The action was detinue, for a slave named Watsey, and her children, under the pleadings as appears upon record, and upon agreement that any defense might be made under the general issue which could be made by any plea in bar and replies thereto; and that the plea of former recovery, with any legal reply thereto, was to be considered regularly pleaded and replied. The defendant introduced a transcript from the records of the county of Perry, Alabama, a copy of which is appended hereto as a part of this bill of exceptions, and marked 'exhibit A;' and the plaintiff introduced the written testimony of John Deloach and William Adair, two of the arbitrators named in said transcript. On this subject these two witnesses testified, that they were called on by M. D. Thomason to sit in arbitration, with the other arbitrators named, about certain lawsuits pending between N. H. Hobson and Thomas B. Bond, and M. D. Thomason and N. H. Hobson, in Perry county, and certain papers held among the parties; that it was during the fall term of the circuit court of Perry; that neither Hobson nor Bond was present, and the arbitration was conducted by M. D. Thomason and Hobson's brother, and agreed to by them. The matters in arbitration, to the best of my knowledge, were the suits and papers above referred to; and the papers referred to the suits. There was no titles to negroes referred to us, nor do they recollect that any were named; but the arbitration was alone upon the suits, and papers belonging thereto, and not as to the title to any negroes. This was all the proof on this branch of the case.

"The proof otherwise tended to show, that plaintiff was the owner of said negroes; that they had been unlawfully taken off by said Hobson, as the agent of one Grimes;

that Grimes had no legal authority for having them taken off, (though, as to this, there was some conflict of evidence;) that they were carried by Hobson to Florida, and sold to one Mrs. Lawson, as the property of Grimes; and that Mrs. Lawson sold them to Odum, the defendant in this suit, in whose possession they were when the suit was commenced."

"Exhibit A" to the bill of exceptions, above referred to, contains, 1st, a writ in an action of trespass, in the circuit court of Perry, issued on the 6th May, 1841, at the suit of M. D. Thomason against N. H. Hobson, to recover damages for the defendant's unlawful act in taking and carrying away a negro woman, named Watsey, and her two children; 2d, a memorandum, entitled in the marginal entry "declaration," but signed by M. D. Thomason, in these words:

"Demand in the circuit court of Perry county, Alabama. The statements of ——, M. D. Thomason, N. H. Hobson, four negroes, for which I have commenced suit as above. Hobson sold the negroes for J. W. Grimes. Said negroes I consider worth some $3,200. This claim I am desirous to show mine, especially as said Hobson has claims against T. B. Bond on my account, as well as claims against me; all of which I propose to leave to arbitration."

The award of the arbitrators is next set out, which is dated May 11th, 1842, and is as follows: "We, H. D. Hare," (and others, setting out all their names,) "the arbitrators chosen and appointed in this case, after the hearing of testimony on both sides, make the following award: That M. D. Thomason pay $50 in complete satisfaction of bond made by Thomas B. Bond to N. H. Hobson, L. B. Lusk; and that Hobson give up to said Thomason said bond, as considered; and that said Thomason enter a credit, in the case now pending in the circuit court of this county, against said Hobson, for the negroes, in detinue, or in a suit for damages, as aforesaid, made in the statement given to us as a basis of our arbitration. Given under our hands and seals," &c.

The submission to arbitration is then set out, which is signed by Thomason and J. D. Hobson, acting as agent

of said N. H. Hobson; describes the matters to be submitted as "the demands made by said Thomason against said N. H. Hobson, and all other demands heretofore existing between the parties, of whatever description, either in law or equity;" and provides that the award of the arbitrators, or a majority of them, "be made to the circuit court of Perry, as soon as may be, and be made the judgment final of said court."

The judgment of the circuit court, rendered at the spring term, 1842, is last set out, and is as follows: "This day came the parties, by their attorneys; and the plaintiff enters a *retraxit* in this case, agreeably to an award of arbitrators. It is therefore considered by the court, that the defendant go hence without day, and recover of the plaintiff his costs by him about his defense in this behalf expended, for which execution may issue."

"Under this state of facts, the court charged the jury,—

"1. That the testimony of the witnesses, as to what was submitted to arbitration, and as to what was decided, must not be regarded by them, so far as the same was in writing contained in the transcript of the record from Perry county.

"2. That if the jury find from the evidence that the girl Watsey, named in the record from Perry county, is the same negro now sued for, then the record from Perry county would bar the plaintiff from recovering in this action; it being admitted, that the other negroes sued for were children of Watsey, born since the arbitration."

The charges of the court to the jury, to each of which the plaintiff excepted, are now assigned as error.

MARTIN, BALDWIN & SAYRE, for the appellant.

WATTS, JUDGE & JACKSON, *contra*.

WALKER, J.—The legal proposition, that parol evidence was not admissible to vary the record, which was intended to be asserted by the first charge, was certainly correct; but the charge is objectionable, because its effect was to shift from the court to the jury the duty of determ-

ining what parol evidence was inconsistent with the record.—DeGraffenreid v. Thomas, 14 Ala. 681.

2. The clerk has copied into the transcript of the record of the circuit court for Perry county a memorandum, made by the plaintiff, of matters which he proposed to submit to arbitration, an agreement between the plaintiff and one Hobson to arbitrate, and the award of the arbitrators, as if those papers were parts of the record. It is possible that the court regarded those papers as a part of the record. The arbitration was not made by order of court; and those papers are not identified, and made matters of record. They were not, therefore, a part of the record, and were not admissible in evidence upon the clerk's certificate.

3. We would not, however, reverse the case, on account of the inadmissibility of this evidence; because it was competent for the plaintiff to waive the absence of the original papers, and proof of their execution; and this he must be understood to have done, by the omission to object to their introduction, or to move the court to exclude them.

4. The second charge of the court assumes, that if the identity of the slave mother was established, the descent of the others from her after the arbitration being admitted, the record, of itself, presents a complete bar to the maintenance of the suit. We proceed to consider the correctness of this assumption. The judgment entry is in the following words: [copying it.] Does that judgment bar the maintenance of this action? To the decision of that question, it is necessary for us to ascertain whether the entry is a technical *retraxit;* and, if it be, what is its effect.

A *retraxit* can only be entered by the plaintiff in person; but it is decided in Conk v. Lowther, 1 Ld. Raymond, 597, that such a recital, as that contained in the entry under consideration, shows that the plaintiff in person entered the *retraxit.* The entry says, that the parties came by their attorneys; but it says, the plaintiff entered the *retraxit.* We must intend, upon the authority of the case from Ld. Raymond, that the plaintiff in person entered the *retraxit.* We must understand the word

retraxit in its well ascertained technical meaning.—In 3 Bla. Com. 296, a *retraxit* is thus defined: "A *retraxit* differs from a nonsuit, in that the one is negative, and the other positive: the nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon the payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit in court, and by this he forever loses his action." So, in Beecher's case, 8 Rep. 58, the same principle is thus stated: "A *retraxit* is a voluntary acknowledgment" by the plaintiff "that he hath no cause of action, and therefore he will no farther proceed, &c.; and therefore is a bar forever."—In 1 Dunlap's Practice, 494, (an American work,) it is said: "The plaintiff may also openly appear in court, and renounce his suit; and this is as complete and effectual a bar, as if a verdict had been rendered for the defendant, and he can never afterwards commence another action for the same cause."—See, also, Bingham on Judgments, 48, (13 L. L. top p. 20;) 7 Bacon's Abr. 215, *Nonsuit*, A; Bullock v. Perry, 2 St. & P. 319.

5. The entry of *retraxit*, upon the authority of the foregoing citations, would, of itself, have precisely the same effect as if there had been a verdict and judgment upon the merits of the case. The action was trover. A verdict and judgment in favor of Hobson, the defendant in the trover suit, would have been conclusive against the plaintiff, in favor of the defendant in this case, holding under Hobson, if the judgment had been rendered before he, Hobson, parted with the property, unless the plaintiff claimed in this suit upon a title acquired after the judgment. But, if the trover suit was commenced after Hobson, who was the defendant therein, had parted with the property, which, by a regular succession of transfers, came to the defendant in this suit, the plaintiff would not be estopped. The defendant in this case could not be estopped or affected by a judgment against Hobson, from whom such defendant derived title, after he (the defendant in the judgment) had parted with the property; and, as estoppels must be mutual, it could not avail the defendant in this suit.—Foster v. Earl of Derby, 1 Adol. & El.

783; Lock v. Nosborn, 3 Mod. 141; 1 Greenleaf on Ev. § 536; Adams v. Barns, 15 Mass. 365; 2 Starkie on Ev. 194. It follows, that the judgment of *retraxit* was, or was not, a bar in this case, according as it was rendered before or after the sale by Hobson. The bill of exceptions does not disclose with certainty whether the judgment of *retraxit* was before or after the sale by Hobson. It was a question for the jury under the facts, and the court was not authorized to assume that it was previous to the sale. The charge was, therefore, erroneous.

6. The action in the circuit court of Perry county was, as we infer from the imperfect record, trover. If the plaintiff's cause of action against Hobson for the conversion was satisfied, it would defeat the suit of the plaintiff in this case, whether it was before or after Hobson sold, because a party is only entitled to one satisfaction. The award of the arbitrators directs, that the plaintiff, M. D. Thomason, shall enter a *credit* in the case pending in the circuit court of Perry against Hobson, "for the negroes, in detinue, or in suit for damages." It does not appear whether this award, that the plaintiff should enter a credit, was predicated upon a decision by the arbitrators in favor of the defendant, Hobson, on the question of title, or upon a decision upon the question of title in favor of the plaintiff, and a satisfaction of the plaintiff for the conversion by Hobson in the numerous matters of controversy submitted to the arbitrators. The arbitrators may have decided the question of title in favor of the defendant, and therefore directed the plaintiff to credit Hobson in the suit against him; or they may have decided the question of title in favor of the plaintiff, and satisfied his claim, on account of the conversion by Hobson, by allowing to him a credit on some charge in favor of Hobson against him. It is not disclosed upon which ground the award was rendered. That was, therefore, an appropriate subject for parol evidence. If, upon another trial, it should be shown that the arbitrators satisfied the plaintiff's claim growing out of Hobson's conversion of the property, by an allowance made to Thomason, the plaintiff, in some other matter embraced in the arbitration,

the award and the judgment of *retraxit* would be conclusive against Thomason in this case, whether it was before or after the sale by Hobson, because the plaintiff is not entitled to two satisfactions. If it should appear that the arbitrators adjudged the question of title against the plaintiff, he is estopped by it, and the judgment of *retraxit* thereupon rendered, if they were before Hobson sold the property.

The judgment of the court below is reversed, and the cause remanded.

MARTIN *vs.* BRANCH BANK AT DECATUR.

[BILL IN EQUITY BY CREDITOR TO ENFORCE IMPLIED TRUST.]

1. *Implied trust in favor of creditor.*—If a debtor deposits in the hands of his surety a note on a third person, as an indemnity against liability, and the surety transfers such note to another person, who is cognizant of the trust, the latter becomes a trustee, by implication of law, for the benefit of the creditor, as to the sums collected on the note.
2. *Statute of limitation bars implied trust.*—The statute of limitations of six years is, unless avoided, a complete bar in equity to the enforcement of an implied trust relative to personal property.
3. *Statute not avoided by creditor's ignorance.*—An allegation in a bill filed by a creditor, seeking to enforce an implied trust in the proceeds of a note, which was placed by the principal debtor in the hands of his surety as an indemnity, and transferred by the surety to the defendant, "that the foregoing facts, relative to said note and the transfer thereof to defendant, have only come to complainant's knowledge within two years before the filing of the bill," is not sufficient to avoid the bar of the statute of limitations, when no fraud is alleged.

APPEAL from the Chancery Court at Bellefonte.
Heard before the Hon. A. J. WALKER.

THIS bill was filed by the Branch Bank at Decatur, seeking to enforce an implied trust, against Daniel M. Martin, in the proceeds of a certain note executed by A. C. Austin, payable to William G. Martin, and by him

endorsed to said Daniel M. Martin, who was the brother of said William Martin. The consideration of this note was the purchase by said Austin of a stock of goods from Henry T. Davis & Co., at whose request it was made payable to said William Martin, and by whom it was placed in the hands of said William Martin, as a partial indemnity against his liability as surety of Davis & Co., on a debt due to said Branch Bank at Decatur. The liability of Daniel M. Martin to the complainant, for the proceeds of this note, is made to rest on his knowledge, at the time of its transfer to him, of the purposes for which it was held by said William G. Martin. A part of the proceeds of this note was collected by the defendant more than six years before the bill was filed, and a part within less than six years. The bill alleged, "that the foregoing facts, relating to said note of A. C. Austin to William G. Martin, and the transfer thereof to said Daniel M. Martin, have only come to complainant's knowledge within two years before the filing of this bill." The defendant demurred to the bill, for want of equity, and because the complainant's demand was barred by lapse of time; and also pleaded the statute of limitations, both of six and of three years.

The cause was first heard before Chancellor Townes, who overruled the demurrer to the bill, and rendered a decree on the merits for the complainant; and his decree was in all things affirmed, on petition for rehearing, by Chancellor Walker. The overruling of the demurrer to the bill, and the final decree for the complainant, are now assigned as error.

Robert C. Brickell, for the appellant.—The statute of limitations is a bar to the relief sought by the bill. The facts alleged create an implied trust.—2 Story's Equity, § 980. Implied trusts are within the statute of limitation. Angell on Limitations, 508; 23 Ala. 358. The only ground on which an exemption from the operation of the statute is claimed, is the plaintiff's ignorance, until within two years before the filing of the bill, of the facts on which the right of action depends. When the plaintiff's

case is, *prima facie*, within the statute, if there be any cause for excepting the case out of the statute, such cause must be alleged in the bill.—8 Porter, 212; 5 Ala. 90. The plaintiff's ignorance of the cause of action, until the statute has perfected a bar, does not prevent the operation of the statute.—Angell on Lim. 195–202; 9 Greenl. 108; 9 Pick. 246. The statute is a good plea in equity, as well as at law, and is equally obligatory on both courts; and whenever the claim, if purely legal, would be barred, a court of equity will apply the legal rule, unless something intervenes which ought, in conscience, to prevent the party from relying on the statute.—7 John. Ch. 89; 2 Story's Eq. § 1520; 17 Vesey, 87.

Fraud, concealed, prevents the operation of the statute in equity.—25 Ala. 161. But this exception rests upon the reason, that the conscience of the party is so affected that he ought not to be permitted to avail himself of the statute; not upon the idea that the court has power to dispense with the statute on account of the hardship of the particular case, but on the intelligible principle, applicable at law as well as in equity, that no one shall be permitted to take advantage of his own wrong. Trusts, created by contract, are not within the statute; for, so long as they are recognized, there is no room for the operation of the statute; and, when once created, a recognition is presumed, until a disavowal and knowledge thereof brought home to the beneficiary; and after such disavowal, the relation of trustee and beneficiary no longer exists, and the statute operates. But mere ignorance of the right can never be received as an excuse for not suing within the prescribed period, unless that ignorance is attributable to the act of the opposite party. The ignorance in this case is not alleged to have been superinduced by the defendant; hence, if there was proof tracing such ignorance to him, it would not avail the plaintiff, but would be inadmissible.

At law, if the defendant does not, by some active expedient, used for the purpose of concealing the fraud, prevent the plaintiff from obtaining a knowledge of the right of action, the statute is a bar.—9 Greenl. 108;

13 Sm. & Mar. 328; 15 Ala. 72, 194; 11 Ala. 679; 17 Ala. 472; 9 Barn. & Cress. 149; 3 Barn. & Ald. 626; 11 Gill & John. 367. In this respect, equity follows the law.—1 How. (U. S.) R. 189. The chancellor decided, that it was the defendant's duty to inform plaintiff of the trust; and that his omission to give this information was a fraud, which deprived him of the benefit of the statute. It might be said, with equal justice, that a man who fails to pay his debt shall not plead the statute, because that failure is a breach of an obligation; an obligation, too, which is higher in point of law than that resting on this defendant, because it springs out of a contract, while his arises only by operation of law, and in opposition to his contract. An attorney-at-law, who has collected and converted his client's money, may plead the statute; and his client's ignorance of the conversion, until after the completion of the statutory bar, is no answer to the plea.—21 Ala. 376; 13 Sm. & Mar. 328.

In cases of mistake, equity will sometimes give relief, notwithstanding the statutory bar; but the party complaining of such mistake is required to show that it was not discovered until after the statute had perfected a bar, and that it could not, by the exercise of reasonable diligence, have been sooner discovered.—7 B. Monroe, 561. So, in cases of fraud, the party complaining must show a concealment of the fraud, and that he could not, by the exercise of reasonable diligence, have obtained a knowledge of it within the statutable period.—Angell on Lim. 195; 9 Pick. 246; 1 Story's Rep. 215; 25 Ala. 161. This rule cannot be relaxed on account of the plaintiff's ignorance of his cause of action. If, in cases of mistake and fraud, he is required to show a discovery, and reasonable diligence to make the discovery earlier; certainly, when he sets up ignorance, he should be required to show that such ignorance was not the result of his own laches; and further, "the time when" his right was discovered, "how discovered, and what the discovery is."—1 Story's Rep. 215; Carr v. Hilton, 1 Curtis, 230; Stearns v. Page, 7 How. (U. S.) R. 819; Veazie v. Williams, 3 Story, 612.

In this case, it is evident that the plaintiff could have discovered the alleged cause of action six years before the filing of the bill, as easily as within two years. What was there to prevent such discovery? There was no concealment—no *suppressio veri*, or *suggestio falsi*. The whole transaction was attended with as much publicity as usually attends such transactions. What occurred within two years before the filing of the bill to quicken the plaintiff's diligence? If it had exercised two years before the diligence it was then exercising, would not the facts have been discovered? Even if the defendant's failure to inform plaintiff of the trust was a fraud, it is a constructive, not an actual fraud; and such frauds are within the operation of the statute.—5 Humph. 293; 9 Pick. 246.

C. C. Clay, Jr., and J. W. Clay, *contra*.—A voluntary conveyance, by one indebted at the time, is fraudulent as to existing creditors.—High v. Nelms, 14 Ala. 353; 6 Ala. 507; 3 Porter, 196. In such case, fraud is a presumption of law, which cannot be repelled by circumstances. Here, so far as the proof goes, the transfer by Wm. G. Martin to the defendant was voluntary. There is no proof of indebtedness by said Wm. G. to defendant, except by the deposition of Wm. G. himself. Being an affirmative allegation, not responsive to the bill, but in avoidance of it, full proof was necessary.—Branch Bank at Huntsville v. Marshall, 4 Ala. 60. Besides, Wm. G.'s deposition bears falsehood on its face, and is contradicted by other evidence in the case.

But, if the transfer of the note was not purely voluntary, and, therefore, fraudulent in law, yet the answer and proof show that it was fraudulent in fact. The statute of limitations does not run, as in favor of a fraudulent vendee or donee, against the creditors of the vendor or donor. Powell v. Wragg & Stewart, 13 Ala. 161. At all events, the statute does not run until the discovery of the fraud by the creditor, or where he could not, by the exercise of reasonable diligence, have discovered the fraud within the period of the statutory bar.—Snodgrass v. Branch Bank at Decatur, 25 Ala. 161.

At all events, the fraud not being discovered by the complainant, and he having no knowledge of the existence of his rights, till within two years before suit brought, the statute does not bar, for it only commences to run from the discovery.—2 Story's Equity, § 1521; Story's Eq. Pl. § 754; 2 Dan. Ch. Pr. 735; Hatfield v. Montgomery, 2 Por. 73; 6 Wheat. 497; 2 Sch. & Lef. 634; 3 P. Wms. 143; 2 Y. & C. 58. Defendant did not advise complainant of the manner in which he obtained the notes, did not inform him of his rights, and did not do anything to put him on inquiry; and his silence amounted to a fraud.

Was not the note transferred in trust for plaintiff's benefit? If so, no length of time would bar the right or remedy. The statute is not a bar as between the trustee and beneficiary.—14 Ala. 315. Those trusts which are peculiarly and exclusively within the jurisdiction of a court of equity, are not within the operation of the statute.—Maury v. Mason, 8 Porter, 222. The statute does not bar in equity, except when the corresponding remedy at law is barred; and in this case plaintiff could maintain no action at law.

The allegations of the answer negative the plea of the statute. It admits that as much as $175 was received within the six years next before the bill was filed. The statute of three years does not apply to the case. If the statute of six years applies, this discovery in the answer would avoid the bar.

RICE, C. J.—By the decree of the chancellor, the complainant was held entitled to recover from the respondent the several sums which he had collected upon the note executed by A. C. Austin to William Martin, and transferred by said William to the respondent. We shall confine ourselves to an examination of the correctness of that decree. Looking only to those allegations of the bill which are either proved or virtually admitted, the right of the complainant rests upon the following facts: In 1837, Henry T. Davis & Co., as principals, and William Martin and certain other persons, not parties to this suit,

as sureties, became indebted to complainant, in the sum of $7,112 38. Davis & Co. sold to A. C. Austin the remnant of their stock of goods, for the sum of $1100, on time; and, at their request, he executed his note for said sum of $1100 to the said William Martin, as an indemnity, or security, in part, against said debt of $7,112 38. Said William Martin received said note on Austin as such indemnity or security, and afterwards, in March, 1839, transferred said note to his brother, the respondent, who was well acquainted with the circumstances by which said note came to the possession of the said William Martin, and who, with knowledge that said note was a trust claim in the hands of said William as aforesaid, collected the whole of it from Austin, and applied the money to his own use,—part of it having been collected by respondent more than six years before the bill was filed, and part collected within six years before the bill was filed. In 1840 the complainant obtained judgment, in the circuit court of Morgan county, on the indebtedness of $7,112 38, against the principals and sureties, and duly sued out a *fieri facias*, which was returned by the proper officer "no property found."

Upon the foregoing facts, a right accrued to the complainant, to recover from the respondent the several sums collected by him on the Austin note. That right accrued, as to each sum so collected by him, as soon as he collected it. As to those sums, he was the trustee of the complainant; but he acquired his character of trustee only by implication. No express or direct trust as to him is shown. The right of the complainant, as against him, is founded entirely upon an *implied trust*. And beyond all doubt, the statute of limitations of six years is, in a court of equity, applicable to this case, and to all other cases of *implied trust in relation to personal property*; and the right of action, in equity, will be considered as barred in six years, in analogy to the limitation at law, unless the bar, when set up as a defense, is avoided by matter alleged in the bill and duly established.—Maury v. Mason, 8 Porter's Rep. 211; Tarleton v. Goldthwaite, 23 Ala. 346; Lewin

on Trusts, 611; 2 Story Eq. Jur. §§ 1520, 1520 *a*; Story's Eq. Pl. § 757; Bond v. Hopkins, 1 Sch. & Lefr. 429; Hovenden v. Lord Annesley, 2 *ib.* 607; Smith v. Clay, Ambler's Rep. 645; Beckford v. Wade, 17 Vesey, 96; Farnam v. Brooks, 9 Pick. Rep. 212.

The respondent pleads and relies on the bar; and it remains for us to determine whether it is avoided, as to the sums collected more than six years before the commencement of the suit, by any matter alleged in the bill. The only allegation of the bill, which has any material bearing upon that question, is in the following words: "Complainant avers, that *the foregoing facts*, relating to said note of A. C. Austin to said William G. Martin, and the transfer thereof to the said Daniel M. Martin, have only come to complainant's *knowledge* within two years before the filing of the bill." The bill does not state a case of secret fraud, nor contain any averment that the transfer of the note to the respendent was made with intent to defraud, or that the cause of action was fraudulently concealed. Its averments do not amount to a denial of *constructive* notice of each cause of action at the time it accrued. It simply avers a want of "*knowledge*" of *the particular facts* specially stated in the bill, without asserting want of *notice*, or ignorance of other facts, notice or knowledge of which might be good constructive notice of each cause of action at the time it accrued.—Hill on Trustees, 510, 512. We feel constrained to hold, that the allegation of a want of "*knowledge*" of *the particular facts* stated in the bill, is not equivalent to an allegation of want of notice of the cause of action; that the complainant's mere ignorance of those particular facts will not avoid the bar of six years, as to the sums collected by respondent more than six years before the bill was filed; and that, as the bill does not allege any matter which is sufficient to avoid the bar as to those sums, the complainant's remedy as to them is lost.—Maury v. Mason, 8 Porter's Rep. 227; Johnson v. Johnson, 5 Ala. 90; Carr v. Hilton, 1 Curtis' Rep. 390; Fisher v. Boody, *ib.* 218; Stearns v. Page, 7 How. U. S. Rep. 829; Wagner v. Beard, *ib.* 241; Farnam v. Brooks, *supra.*

The decree of the chancellor is erroneous, and must be reversed; and a decree must be here rendered, in favor of the complainant, for such sum or sums only as may have been collected by the respondent, on the said note executed by A. C. Austin to William G. Martin, in the pleadings mentioned, within six years next before the filing of the bill, and interest on such sum or sums from the time of the collection; and referring it to the registrar of the chancery court of Jackson county, to ascertain and report to the next term of said chancery court such sum or sums, and the time when collected, and the interest accrued thereon from the time of collection to the time of making his report. Upon the confirmation of the report, execution must issue for the amount reported in favor of complainant, against the respondent. The respondent must pay the costs of the court below; and each party must pay one half of the costs of the appeal to this court.

INGRAHAM *vs.* FOSTER.

[BILL IN EQUITY FOR SETTLEMENT OF PARTNERSHIP ACCOUNTS—CROSS BILL SETTING UP FRAUD.]

1. *Difference between contract of partnership and agreement to form partnership.*—Where the written articles recite that the parties "have entered into a partnership," the terms and stipulations of which are stated, and fix no time for its commencement, they evidence not a mere agreement to form a partnership, but a subsisting contract of partnership from the day of their date.
2. *Rescission of contract of partnership on account of fraud.*—Where one partner files a bill against his several partners, for a settlement of the partnership accounts and his share of the profits, a fraud perpetrated by him on one of the defendants, in a former partnership between them individually, by means of which he procured the funds contributed as his share of the capital of the new firm, is no ground for annulling or rescinding the contract of partnership. (RICE, C. J., *dissenting*, held that such fraud was a bar to the relief sought by the bill.)
3. *Amendment of bill.*—Where the original bill, seeking a settlement of a partnership in a steamboat, and the ascertainment of plaintiff's share of the profits, alleged that plaintiff had sold his interest in the boat to a third

person, who was entitled to his share of the profits accruing from the time of the sale; while the amended bill alleged, that said transfer, though absolute in form, was intended only as a mortgage or security,—*held*, that the repugnancy between these conflicting allegations was not so great as to render the allowance of the amendment improper.

4. *Equitable set-off.*—An equitable demand, accruing to one of the defendants from a fraud perpetrated on him by the plaintiff in a former partnership between them, is available as a set-off in favor of such defendant, when plaintiff files a bill for a settlement of a new partnership between them and others, and is shown to be insolvent.

APPEAL from the Chancery Court of Mobile.
Heard before the Hon. WADE KEYES.

THE original bill in this case was filed by James G. Ingraham, the appellant, against Phineas O. Foster, Roger A. Hearne, and James A. Gage; alleging that, in April, 1849, complainant and defendants entered into written articles of partnership for the building of a steamboat, to be employed in trade in the bay of Mobile,—each partner to pay one fourth of the expenses, and to have one undivided fourth interest in the boat and profits; that a boat was built in pursuance of this agreement, called the *Swan*, and employed by the parties as specified in their articles of partnership; that the command of the boat was entrusted to Foster, who, with said Gage, received all the profits realized by it, which amounted to a large sum; that complainant sold out his interest in said boat, on the 9th April, 1851, to Jacob B. Walker, who, "from that time, became entitled to the interest in said boat which complainant had possessed," but not to any share of the profits which had previously accrued; that complainant had frequently demanded a settlement of the accounts connected with the boat's business, but the defendants refused to make any settlement, and would not let him examine the books and accounts. The prayer of the bill was for a discovery and account of the partnership accounts, and for a decree against the defendants for complainant's share of the profits realized by the boat.

An amended bill was afterwards filed, by leave of the chancellor, alleging that the transfer by complainant to Walker, "though absolute in form, was nevertheless in-

tended as a security merely, and was designed to secure said Walker in the re-payment of certain sums of money then owing to him by complainant, and of other sums which Walker agreed to advance to complainant from time to time"; "that the contract was made to assume the form of an absolute sale, to enable Walker the more readily to assert his rights, and to receive the proportion of the profits of said boat which might afterwards accrue to him"; that Walker and complainant have, "within a short time past," had a settlement of their matters of accounts, on which it was ascertained that there was a balance in Walker's favor of $2,221 62; that Walker's bill of sale creates a lien on complainant's interest in the boat for the payment of this balance, and, after its payment, complainant is himself entitled to the residue of his original share of the profits realized by the boat from the time of the transfer. The amended bill further alleged, that the defendant Gage had transferred his interest in the boat to George Blakesley, against whom process was prayed as a party; and added a prayer for the sale of the boat, and for other and further relief.

The defendants filed separate answers to each of the bills; admitting, in their answers to the original bill, the formation of the partnership, the building of the boat, and the realization of profits from its business. Foster alleged, in his answer to the original bill, that at the time said partnership was formed, and for some time prior thereto, he and complainant were equal partners in two steamboats, called the *Inda* and the *Belle Creole*, which were engaged in the Mobile trade; that complainant was the cashier and book-keeper of the partnership, received all the moneys, made all the disbursements, and had charge of the books and papers; that the business realized large profits, and their success induced them to enter into the purchase of the new boat, into which the other defendants were admitted as partners; that a portion of the funds invested in the purchase of the *Swan* were drawn by him from the firm of Ingraham & Foster in their other business; that complainant made false and fraudulent entries on the books of the *Inda* and *Belle*

Creole, by which he defrauded defendant out of large sums; that, if said books had been honestly and correctly kept, defendant's share of the net profits would have amounted to more than the entire sums drawn from said partnership and invested in the purchase of the new boat; that no other moneys were advanced by complainant towards the purchase of the new boat; that defendant, on discovering the frauds perpetrated on him by complainant, insisted on an inspection and examination of the books of the *Inda* and *Belle Creole*, and a settlement of the partnership accounts connected therewith, which the complainant refused; that the complainant is insolvent, and that the pretended transfer to Walker was fraudulently intended to defraud defendant of his rights. It was prayed that this answer might be taken as a cross bill; that Ingraham might be compelled to come to a settlement and account of the partnership matters connected with the *Inda* and *Belle Creole;* and the general prayer, for other and further relief, was added. No controversy arose respecting the interests of the other defendants to the original bill, nor did they in any manner connect themselves with the matters at issue between Ingraham and Foster.

All the defendants demurred to the amended bill, on account of its inconsistency with the original bill; and the chancellor sustained the demurrer, but dismissed the amended bill without prejudice. A reference of the matters of account connected with the *Swan*, and also of the accounts between Ingraham and Foster connected with the *Inda* and *Belle Creole*, was ordered by the chancellor; and, on final hearing, after the coming in of the master's report, he dismissed the complainant's bill.

The chancellor's decree is now assigned as error.

E. S. Dargan, for the appellant.—1. The amended bill is not repugnant to the original, nor does it make a new case. It asserts the same title, and seeks the same relief; correcting only an erroneous statement of the original bill, and somewhat enlarging the measure of relief to which the plaintiff was entitled. That the amendment

was allowable, see 1 Dan. Ch. Pr. 454, and note; 5 Wendell, 660; 10 Pick. 128; 1 Johns. Ch. 184; 1 Edw. Ch. 46; Story's Eq. Pl. § 884.

2. The fraud, alleged to have been perpetrated by Ingraham, in the matters of the *Inda* and *Belle Creole*, is no bar to the relief sought in this case. The principle is admitted, that a plaintiff cannot recover when he requires the aid of an illegal contract. But, if the plaintiff can prove his case without reference to the illegal contract, or without bringing it before the court, there can be no legal objection to his recovery. If the illegal contract is at an end, and new relations have sprung up between the parties, even though the consideration of the new contract be partly founded on the illegal transaction, or partly connected with it, the new contract may be enforced.—Phalen v. Clark, 19 Conn. 421; Boothe v. Hodgson, 6 Term Rep. 405; Fivaz v. Nicholl, 2 Man., Gr. & Scott, (52 E. C. L.) 500, 511. The partnership between Ingraham and Foster, in the *Inda* and *Belle Creole*, is totally separate and distinct from the partnership between them and others in the *Swan*: the parties and subject-matter are both different.

3. Foster filed a cross bill, seeking relief against the alleged fraud in the matter of the *Inda* and *Belle Creole;* and the principle is well-settled, that he who seeks equity must do equity.—1 Story's Equity, § 301. Both parties are before the court, each seeking relief against an alleged fraud committed by the other; and no reason exists why the court, instead of dismissing both bills, should not go on and do complete justice between the parties.

Wm. G. Jones, *contra*.—1. The demurrer to the amended bill was properly sustained, on account of the repugnancy between its allegations and those of the original bill. Larkins v. Biddle, 21 Ala. 252. The amended bill does not allege that, when the original bill was filed, the plaintiff was ignorant of the facts; indeed, the facts must have been within his personal knowledge. He does not pretend that the false statements of the original bill were made by accident or mistake. He occupies, then, the

position of one who knowingly makes a false statement in his original bill, and attempts to perpetrate a fraud on the court, in making it instrumental in carrying out his fraud on another.

2. The gross frauds committed by Ingraham, in the matters of the *Inda* and *Belle Creole*, preclude him from the relief which he seeks. It is a maxim of courts of equity, which also prevails to some extent in courts of law, that a party who seeks relief must come into court with clean hands. The application of this principle, in its different phases, fully justifies the decree of the chancellor.—Collins v. Blantern, 2 Wilson's Rep. 341–10; Creath v. Sims, 5 How. (U. S.) R. 204; Bartle v. Coleman, 4 Peters, 184; Dilly v. Barnard, 8 Gill & John. 170; Taylor v. Pugh, 1 Hare, 608; 2 Story's Equity, §§ 736–49; Fonblanque's Equity, (3d Amer. ed.) 723.

3. All the money advanced by Ingraham, in building the *Swan*, was really and equitably the money of Foster; and it is a well-settled principle of equity, that when the title to property bought is taken in the name of one man, but the money paid belongs to another, a trust results in favor of the latter, and he is considered in equity as the true owner.—2 Story's Equity, §§ 1201–07.

WALKER, J.—It is necessary to inquire in this case, what is the object of the complainant's bill. Is it a bill for a specific performance, and is the complainant's right to relief to be determined according to the rules which apply to suits for a specific performance of contracts? It is certain that the complainant's bill is not designed to be an application for the specific performance of a contract, for it avers the existence of the partnership, its continuance for some time, and the receipt of large profits, and only prays a recovery of the complainant's share of the profits. Upon the allegations and prayer of the bill, the complainant would not be entitled to the specific performance of an unexecuted contract. It may, therefore, be conceded that, if the proof makes a case where the complainant can only have relief by way of specific performance, the bill was properly dismissed by the chancellor.

A specific performance is necessary, where the contract is executory—where the stipulation is *to do* something; as, for instance, to convey, as distinguished from an actual conveyance; or to form a partnership, as distinguished from a deed creating an actual partnership, or evidencing a subsisting partnership, and actually clothing the members of the concern with the character of partners. 2 Story's Eq. Jur. §§ 714, 722. We find the distinction stated in Collyer on Partnership, § 202, as follows: "*Before the partnership is actually constituted*, there is frequently a written agreement between the parties *to enter into partnership;* which agreement is not considered as the *final* contract between them, but merely as expressing an intention that such contract shall be completed by subsequent acts, or by articles of partnership. It should be noticed, therefore, before we examine the different clauses of the articles themselves, that a court of equity will, under certain circumstances, compel the specific performance of an *agreement to enter into partnership.*"

Was there between the parties, when this bill was filed, a subsisting partnership, or a mere agreement to form a partnership? The copartnership articles witness that the parties "*have*" entered into a partnership for the building of a steamboat, &c., of which each of the parties is to own one fourth. These articles evidence a subsisting partnership from their date; they contain no agreement to form a partnership. When no time is mentioned for the commencement of a partnership, it begins at the date of the articles.—Collyer on Partnership, § 213; Story on Partnership, § 194. Then the partnership in this case, between the complainant and Foster and two others, actually commenced on the 14th April, 1849, (the date of the articles,) and at that time the rights and obligations incident to the relation, both as between the parties and as to its creditors, attached. The proof shows, that the complainant was recognized and treated as a partner, until after the boat was built and brought to Mobile, in February, 1850. Now it is manifest, that here there was an actual and subsisting partnership, acknowledged and recognized for some time, and until a steamboat had been

built for the partnership, and brought to Mobile in pursuance to the terms of the partnership. There is, therefore, no question in the case of a specific performance of a contract to form a partnership.

The true question is, whether a partner who is such by the terms of the partnership, and who has been recognized and treated as such for a time, can be deprived of all participation in the profits of the concern, because the funds which he carried into the partnership, as his equal contribution of the capital stock, had been procured by a gross fraud, perpetrated by him on one of his three copartners, in another and distinct partnership; or, in other words, will the chancery court rescind or annul the contract of partnership, so far as it secures the rights of a partner to him who committed the fraud. The complainant is, by the contract, a partner. His character as a partner is confirmed by the operations of the company, in pursuance to the articles, until some time in the year 1850. All the liability of a partner as to the creditors of the concern, and others with whom it may have had business, has been upon him. He is a partner, and needs no decree of the court to constitute him a partner. He has a partner's right to participate in the profits, unless the court deprives him of that right by rescinding the contract which constitutes him a partner. The question is, therefore, as to the rescission of the contract upon Foster's cross bill.

Waiving the consideration of the point as to whether it is shown that the complainant, who is certainly liable to the creditors, would be placed in *statu quo*, we place the denial of a rescission upon the ground, that the fraud is in a different transaction, altogether separate and distinct from the contract of partnership. There was a partnership in two steamboats, called the *Inda* and *Belle Creole*, between complainant and Foster, which existed some time before the formation of the partnership between complainant, Foster, Hearne, and Gage. For Foster it is contended, that the complainant made fraudulent entries upon the books of the partnership in the *Inda* and *Belle Creole;* that he designedly omitted to charge himself, where he was

chargeable, and credited himself with improper sums; that the funds carried into the partnership in the *Swan* were the funds of the other partnership, and, upon a correct accounting, were due to Foster; and that, therefore, the complainant has fraudulently invested in the *Swan* partnership money as his own, which good faith required him to pay over to Foster on a settlement of the other partnership. Conceding those facts, contended for on the part of Foster, to be true, the fraud was not one affecting the contract of partnership entered into by these four persons. That it did not enter into that contract at all, is shown by the fact, that it does not affect any of the partners besides Foster. It affects Foster, not in the relation produced by the last partnership, but in his relation of partner with the complainant alone in the *Inda* and *Belle Creole*. It is altogether a separate and distinct matter, and is, therefore, no ground for a rescission, as is settled by the decisions of this court, in Pulliam v. Owen & Russell, 25 Ala. 492, and Byrd v. Odem, 9 Ala. 755.

In this case, there were four partners. It would be unreasonable that Foster should, on account of a separate transaction between him and Ingraham, annul the partnership as to Ingraham, without the consent of the other partners, and thus create a new partnership between three, in which he takes one half the profits, notwithstanding the partnership agreed upon was between four persons, and each was to receive one fourth of the profits. If Foster can annul the partnership as to Ingraham, on account of a fraud in some independent transaction, it is conceivable, that cases might arise, in which one of four partners might annul the partnership as to each of the others, and constitute himself the sole recipient of the profits, while as between the partners in the contract of partnership there was a total absence of fraud.

It is contended for the appellees, that the demurrer to the amended bill should be sustained, because the matter of the amendment is repugnant to the original bill, and makes a new case. The original bill avers, that on the 9th April, 1851, the complainant sold to one Jacob B. Walker his interest in the boat, and, from that time,

Walker was entitled to the interest; but that the complainant was entitled to the earnings and profits up to that time. The amended bill varies those allegations, by saying that the sale to Walker, though absolute in form, was designed to be a mere mortgage, or security, for advances in money made and to be made by Walker for Ingraham; and that, upon accounting, $2,221 62 was ascertained to be the amount due to Walker, who held the absolute title as a security for that amount. There is an inconsistency between the allegations of the original and amended bills; but such inconsistency is not a fatal objection to an amendment, unless it have the effect of making a new case. To make an amendment improper, it is not enough that there be a mere inconsistency, or repugnancy of allegation; there must be an inconsistency or repugnancy of the purposes of the bill, as contradistinguished from a modification of the relief. One of the purposes of a chancery amendment is, to correct an erroneous statement of the facts. The effect of the amendment allowed in this case, was not to make a new case, but to enlarge the measure of relief—to remove a limitation placed upon the complainant's relief by an erroneous allegation, and to extend its area, so as to include an additional matter of relief in the same case, excluded by the incorrect statement of the original bill. The contract, the evidence, and the defense, remain the same under the bill as amended.

It may be, that the making of the incorrect statement in the original bill was the result of design, and not of mistake, and had its origin in a corrupt intent. If such was the case, it was a matter proper for the consideration of the chancellor, in determining whether the amendment should be allowed. The chancellor allowed the amendment. It does not appear from the record upon what evidence he acted in its allowance; and we cannot presume that such a corrupt intent existed, or was shown to the chancellor. The question of amendment in this case is not identical with the question in the State, *ex rel. &c.* v. Mayor of Mobile, 24 Ala. 701; and Larkins v. Biddle,

21 Ala. 252. In those cases, the effect of the amendment would have been to have made a new case.

The cross bill avers, and the evidence proves, the insolvency of Ingraham. The claim of Ingraham against Foster is one pertaining to a court of equity, and so is the claim of Foster against Ingraham. The claim of Foster is, therefore, a proper subject for an equitable set-off.—Carroll v. Malone, 28 Ala. 521; Wray v. Furniss, 27 Ala. 471; T. C. & D. R. R. Co. v. Rhodes, 8 Ala. 206. "A cross bill may be sustained, for the purpose of obtaining an equitable set-off."—Goodwin v. McGehee, 15 Ala. 232.

There must be an account, for the purpose of ascertaining the measure of the complainant's relief under the original bill, and of the defendant's relief under the cross bill. As the question arising upon the details of the account have not been argued before us, we deem it safer to leave it to the chancellor, who will have the counsel before him to make the decree.

The judgment of the court below is reversed, and the cause is remanded for further proceedings in pursuance to the foregoing opinion.

RICE, C. J., *dissenting*, held that the fraud perpetrated by Ingraham on Foster was a bar to the relief sought in this case.

COWLES *vs.* TOWNSEND & MILLIKEN.

[ASSUMPSIT ON BILL OF EXCHANGE, BY PAYEE AGAINST ACCEPTOR.]

1. *Admissibility of parol evidence to vary written acceptance of bill.*—In an action by the payees against the acceptor of a bill of exchange, the defendant cannot be allowed to prove that he accepted the bill under a verbal agreement with the payees, to the effect that, if the bill was not paid at maturity, the payees "should not call upon him until they had prosecuted the drawers to judgment or insolvency, and used all proper and lawful means to collect the same."

APPEAL from the Circuit Court of Montgomery.
Tried before the Hon. E. W. PETTUS.

THIS action was brought by Townsend & Milliken against George Cowles, and was founded on the defendant's acceptance of a bill of exchange for $950, drawn by Rudler & Rockwell, dated September 28th, 1849, and payable eight months after date, to said Townsend & Milliken, at the office of J. S. Winter & Co., in Montgomery. On the trial, as the bill of exceptions states, "the defendant proved, that the consideration for which said bill of exchange was given, was goods sold and delivered by plaintiffs to said Rudler & Rockwell, the drawers, who were merchants and partners; and then offered to prove, by the deposition of one Michael Rudler, 'that the verbal agreement and understanding, under and by virtue of which said Cowles accepted said bill, was this: That said Townsend & Milliken should not call upon him, until they had prosecuted said Rudler & Rockwell to judgment or insolvency. The understanding was, that in the event of R. &. R. not paying the bill at maturity, said Townsend & Milliken were to use all proper and lawful means to collect the same, before they had any right to call on said Cowles. This was the agreement, as witness understood it at the time, and always since.' " The exclusion of this evidence, to which the defendant excepted, is the only matter assigned as error.

WATTS, JUDGE & JACKSON, for the appellant, cited Branch Bank at Mobile v. Coleman, 20 Ala. 141; Hopper v. Eiland, 21 Ala. 714; Murchie v. Cook & McNab, 1 Ala. 41; Litchfield v. Falconer, 2 Ala. 280; Paysant v. Ware & Barringer, 1 Ala. 160–72; Rivers & Portis v. Dubose, 10 Ala. 477.

GOLDTHWAITE & SEMPLE, *contra*, cited Addison on Contracts, 159; Litchfield v. Falconer, 2 Ala. 283; Carleton v. Fellows, 13 Ala. 437.

STONE, J.—The contract declared on in this case is

an absolute, primary obligation to pay money. The testimony which the court rejected, was offered with the view of proving a cotemporaneous oral agreement of the parties, that the liability of appellant was not absolute and primary, but contingent and secondary. Thus viewed, a more palpable attempt to vary, by parol, the terms of a written contract, cannot be presented.—See Phil. Ev. Cow. & Hill's notes, part II, pages 591–3.

It is contended that the payees of the bill practiced a fraud on the acceptor, in procuring his absolute promise to pay, when the real agreement was, that he was liable only after the legal remedies against Rudler & Rockwell should be exhausted. Actual fraud generally consists of the assertion of a falsehood, or the suppression of some known fact, which the party is in duty bound to communicate. The violation of a promise, without more, cannot be called a fraud. If, in obtaining the acceptance of Cowles in this case, Townsend & Milliken had informed him that the effect of his acceptance would be to render him liable only after the drawers should be sued to insolvency, and by such statement they had obtained his signature, we will not say such conduct would not furnish a defense to the action. The testimony offered in this case did not tend to prove this state of facts.—Rivers & Porter v. Dubose, 10 Ala. 475. Some of our decisions on this point have gone to the outside verge of propriety. See Murchie v. Cook & McNab, 1 Ala. 41; Hopper v. Eiland, 21 Ala. 714. None of them can avail the appellant in this case. There is no sounder principle in the law books, than that which at law, and in the absence of fraud, holds all previous and cotemporaneous negotiations as merged in the written contract.—Addison on Contracts, 158–9; Litchfield v. Falconer, 2 Ala. 282; Melton v. Watkins, 24 Ala. 436; Stoudenmeier v. Williamson, 29 Ala. 558, and authorities cited.

There is no error in the record, and the judgment is affirmed.

TRAUN *vs.* KEIFFER AND WIFE.

[DETINUE FOR SLAVES.]

1. *Coercing satisfaction of judgment.*—A judgment in detinue, in favor of the plaintiff, having been reversed on error, at the instance of the defendant, after satisfaction had been coerced under execution, the plaintiff cannot be required, before proceeding with another trial of the cause, to restore the money and property to the defendant or to the sheriff.
2. *Admission implied from payment under legal process.*—The delivery of property to the sheriff, or the payment of its assessed value in money, under process in his hands issued upon a judgment which is afterwards reversed, is no admission or acknowledgment of the plaintiff's title.
3. *Evidence rebutting admission implied from silence.*—Defendant having proved, that the slaves in controversy were appraised as a part of the estate of his intestate, in plaintiff's presence, and that plaintiff then asserted no title in herself, it is competent for the plaintiff to rebut this evidence, by proof of her private assertions of title to one of the appraisers, before the completion of the appraisement.
4. *Estoppel en pais from silence.*—If a person suffers another, in his presence, to purchase from a third person property to which he has a title, of which title the purchaser is ignorant his failure to assert his title will estop him from afterwards setting it up against such purchaser; but mere silence, upon which no action has been predicated, no liability incurred, and from which no loss has been sustained, cannot amount to an estoppel.
5. *Statute of limitations available under general issue in detinue.*—In detinue, the defense of the statute of limitations is available under the plea of *non detinet*.
6. *What constitutes adverse possession.*—The donor's subsequent possession and control of slaves, "as his own property," does not necessarily constitute an adverse possession against the donee, who was his niece, and who lived with him as his housekeeper.
7. *Charge on sufficiency of evidence.*—Where there is any evidence, however weak, tending to establish a material question in the case, the court may properly refuse to charge the jury that it is insufficient.
8. *General charge on evidence invading province of jury.*—When there is any conflict in the evidence on a material point, the court may properly refuse a general charge in favor of either party.

APPEAL from the Circuit Court of Dallas.
Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Mary Wittick, then a *feme sole*, against Henry Traun, to recover a negro woman, named Betsey, and her seven children, Dick, Jim, Lucy, Sarah, John, Ann, and Edward. The plaintiff having

intermarried, pending the suit, with one Louis Keiffer, her husband was made a party with her. At the fall term, 1852, a judgment on verdict was rendered for the plaintiff, which was amended *nunc pro tunc* at the next ensuing term; and this amended judgment was reversed by this court, at its June term, 1855, and the cause remanded, as shown by the report of the case in 27 Ala. 570. When the case was called for trial, as appears from the bill of exceptions in the present record, "the defendant showed to the court that, at a former term, a judgment on verdict was rendered against him, for all the slaves in controversy except the girl Ann; that an execution in the usual form was issued on this judgment, and placed in the hands of the sheriff of the county; that satisfaction of said execution being demanded by the sheriff, defendant delivered up to him, in satisfaction thereof, four of said slaves, and paid in cash the alternate value of the others as assessed by the jury; that the execution was thereupon returned by the sheriff 'satisfied,' and the negroes and money received under it were handed over by him to the plaintiff; that said judgment was afterwards reversed by the supreme court, on writ of error, and the cause remanded; that plaintiff still retained the slaves and money collected under said judgment, and refused to return the slaves or to refund the money; that defendant afterwards brought his action of detinue against plaintiff, in the circuit court of Lowndes, for two of said slaves, Betsey and Edward, and now had them in his possession under a statutory bond given in said suit; that plaintiff had recovered a judgment in that action, and defendant had appealed to the supreme court. On this state of facts, the defendant insisted that, before going to trial, the plaintiff should be required to place him in *statu quo*, by refunding the money and restoring the slaves, or, at least, by delivering the slaves to the sheriff, and paying the money into court, to be subject to further proceedings in the premises; and moved the court accordingly. But the court overruled the motion, and required the defendant to go to trial; and the defendant excepted."

The defendant pleaded, "in short by consent," 1st, *non detinet;* and, 2dly, "that the slaves sued for came to defendant's possession, after the death of his intestate, as a part of his estate, and that he held the same as such,—the said slaves being in the possession and the property of said intestate in his lifetime."

All the evidence is set out in the bill of exceptions, but a brief summary of it is sufficient to explain the questions which are here presented for revision. The plaintiff claimed the slaves in controversy, under a parol gift of Betsey, the mother of the others, from Frederick Wittick, who was the uncle of her first husband; while the defendant relied on the title of said Frederick Wittick, of whose estate he was the administrator. The plaintiff adduced evidence, tending to show that she and her first husband, who were natives of Germany, came to the United States on the invitation of Frederick Wittick, in 1836; that her husband died on his arrival in Mobile; that she soon became dissatisfied with the country, and desired to return to Germany; that said Wittick, to induce her to remain here and live with him, gave her the girl Betsey; that she continued to live with him, and attended to his domestic affairs as his housekeeper, from that time until his death, which occurred in 1850; that Wittick always recognized the girl Betsey as belonging to her, admitted her title, asked her permission about the employment of the girl, &c. On the part of the defendant it was proved, that the slaves remained in the possession of said Wittick, and upon his plantation, up to the time of his death; that several persons, who were employed about the place in different capacities, had never heard of the plaintiff's claim of title to them; that after the death of said Wittick, the slaves passed into the possession of defendant as his administrator, and were appraised as part of his estate; that plaintiff was present at the appraisement, and made no objection to the slaves being included as a part of the assets, though she claimed several articles of household furniture. In rebuttal of the defendant's evidence on this last point, the plaintiff proved, by one of the appraisers, "that after the appraisement, but before the appraisers

had dispersed, and before they had signed the appraisement," she called the witness into a private room, and there stated to him that she claimed Betsey and her children; and the witness further stated, that he never communicated this fact to the other appraisers or to the defendant. The defendant objected to this evidence, and moved the court to exclude it from the jury; and also excepted to the overruling of his objection.

The plaintiff offered to prove, by one Harris, "that he, as sheriff of Dallas county, had received an execution from this court, in favor of plaintiff, and against defendant, for seven of the slaves in controversy, or their alternate value as assessed; and that defendant had delivered up to him, on his demand as sheriff, under said execution, a portion of the slaves therein mentioned, and had paid the alternate value of the others as assessed." The defendant objected to the admission of this evidence, and reserved an exception to the overruling of his objection.

The defendant requested the court to give the following charges to the jury:

"1. If the jury believe from the evidence that the slaves in controversy were on the plantation and in the possession of Frederick Wittick at his death, and went into the possession of his administrator as part of his estate; and that the plaintiff was present while the estate of said Wittick was appraised, and understood and witnessed the appraisement, and saw the slaves in controversy pointed out by the administrator to the appraisers as a part of the estate; and that the appraisers appraised and inventoried them as part of said estate; and that the slaves, as appraised and inventoried, were returned to the probate court, and were treated by the court and administrator as belonging to said estate; and that plaintiff made no objection to the proceedings, and gave no notice to the appraisers or the administrator of any claim to the slaves,—she is now estopped from asserting any claim to said slaves.

"2. If the jury believe the evidence in this case, the plaintiff is estopped from setting up a claim to the slaves in controversy against the administrator of Frederick Wittick.

"3. If Frederick Wittick held continuous possession and control of the slaves in controversy, as his own property, for six years next preceding and down to his death, the plaintiff's claim is barred by the statute of limitations, and she cannot recover; and this applies to each one of the slaves separately.

"4. If the slaves in controversy were in the possession of Frederick Wittick at the time of his death, and then went into the possession of his administrator as a part of his estate,—the said Wittick, up to the time of his death, continuously treating and controlling them as his own—if, under these circumstances, the possession of said Wittick and his administrator continued for six continuous years prior to the commencement of this suit, the plaintiff cannot recover; and this applies to each one of the slaves separately.

"5. It is indespensable to the perfection of a parol gift, that the delivery of the slave by the donor should be proved; and taking all the proof in this case to be true, there is no sufficient proof of the delivery of the woman Betsey and her children.

"6. The delivery of the slaves Betsey and her children cannot be inferred from the facts proved in this case.

"7. The proof in this case is not sufficient to establish a valid gift, from Frederick Wittick to the plaintiff, of the woman Betsey and her children."

The court refused to give any of these charges, and to the refusal of each one the defendant excepted; and he now assigns as error all the rulings of the court to which exceptions were reserved.

Wm. M. Byrd, and D. W. Baine, for appellant.—1. The court below had the power, and should have exercised it, to compel the plaintiff to restore what had been coerced from the defendant under the reversed judgment, before proceeding to another trial, which might give the plaintiff a double recovery.—Hall v. Hrabrowski, 9 Ala. 278; Bradford v. Bush, 10 Ala. 274; Tidd's Practice, 470.

2. The evidence of Harris was incompetent, and ought not to have been admitted. The delivery of the slaves by

the defendant, and his payment of money to the sheriff, being made under legal process then in the officer's hands, could not be considered voluntary; and not being voluntary, no implied admission could properly be inferred from those acts.—1 Phil. Ev. 349; Gamble v. Gamble, 11 Ala. 1010; Byrd v. Odem, 9 Ala. 756.

3. The plaintiff's declarations to Hardy, one of the appraisers, were not admissible as a part of the *res gestæ*. She was not in the possession of the slaves, and could not prove title in herself by her own declarations.—1 Greenl. Ev. § 329; 1 Phil. Ev. 372; Abney v. Kingsland, 10 Ala. 355. These declarations were made after the appraisement, and were not a part of the same transaction.—People v. Green, 1 Parker's Cr. Rep. 11; Stewart v. Sherman, 5 Conn. 244; Ogden v. Peters, 15 Barbour, 562; Roberts v. Trawick, 22 Ala. 493.

4. The plaintiff's failure to claim the slaves at the time of the appraisement, coupled with the fact that the administrator returned them in his inventory, operates an estoppel against the plaintiff, which is not avoided by her subsequent private claim to one of the appraisers, not communicated to the defendant.—McCravey v. Remson, 19 Ala. 436; Pool v. Harrison, 18 Ala. 514; Steele v. Adams, 21 Ala. 534; Garrett v. Lyle, 27 Ala. 586.

5. The third and fourth charges asked, relative to the defense of the statute of limitations, asserted correct legal propositions, and were authorized by the evidence.

6. The facts proved do not, in legal contemplation, establish a parol gift.—Hunley v. Hunley, 15 Ala. 104; Bryant v. Ingraham, 16 Ala. 116; Jones v. Dyer and Wife, 16 Ala. 221; Seawell v. Gliddon, 1 Ala. 52; Blakey v. Blakey, 9 Ala. 391; Sims v. Sims, 2 Ala. 117; Phillips v. McGrew, 13 Ala. 255.

Geo. W. Gayle, and Thos. Williams, *contra*.—1. After the issues had been made up, and the parties had announced themselves ready, the court had no power to refuse to proceed with the trial. Nor could the court know, until a trial was had, that the slaves and money did not belong to the plaintiff. If the plaintiff had failed,

the defendant had a perfect remedy. The plaintiff's right having been established, the defendant has not been injured.

2. The delivery of the slaves to the sheriff, and the payment of money to him, under the former recovery, must be regarded as voluntary acts, because the defendant might have superseded the judgment; and being voluntary acts, on which the plaintiff afterwards acted by spending the money, the defendant is thereby estopped. Steele v. Adams, 21 Ala. 534; Lay v. Lawson, 24 Ala. 184; Gwynn v. Hamilton, 29 Ala. 233.

3. The testimony of the witness Hardy, relative to plaintiff's claim of the slaves at the time of the appraisement, was in rebuttal of defendant's evidence on the same point, from which he sought to establish an implied admission.

4. The facts proved do not make out a case of estoppel against the plaintiff. The public assertion of her claim, at the time of the appraisement, would have had no other effect than the private assertion of it had. Her failure to assert her claim publicly gave her no advantage, and did no injury to the defendant Moreover, she was an ignorant foreigner; and a mistake of her legal rights, caused by her ignorance, cannot create an estoppel.—Inge v. Murphy, 10 Ala. 885; Gamble v. Gamble, 11 Ala. 966; Pounds v. Richards, 21 Ala. 424; Hunley v. Hunley, 15 Ala. 91.

5. Possession and control by defendant's intestate, "as his own property," did not create an adverse holding against the plaintiff.—Pool v. Harrison, 16 Ala. 167; Kennedy v. Innerarity, 16 Ala. 239.

6. The 5th, 6th, and 7th charges asked by the defendant, were invasions of the province of the jury, and, for that reason, were properly refused.—Bryan v. Ware, 20 Ala. 687; Freeman v. Scurlock, 27 Ala. 407; Stanley v. Nelson, 28 Ala. 514; Foust v. Yielding, 28 Ala. 658; Ivey v. Owens, 28 Ala. 641; Nelson v. Iverson, 19 Ala. 95; King v. Pope, 28 Ala. 602; Lawler v. Norris, 28 Ala. 675.

WALKER, J.—The defendant's motion, to require the plaintiff to restore the slaves and money received by her, or to return them to the sheriff, before proceeding to trial, was properly overruled. The principle settled in the two cases of Hall v. Hrabrowski, 9 Ala. 278; and Bradford v. Bush, 10 Ala. 274, manifestly has no application here. That principle is, that a plaintiff shall not take the benefit of the reversal of a judgment, while he asserts the validity of the judgment by retaining money collected under it. Here the defendant has obtained a reversal of the judgment; and he may fully protect myself, by pleading in an appropriate manner the facts upon which his motion is predicated. If the property and money belong to the plaintiff, it would be extremely unjust to compel the restoration of them to the wrongful possession of the defendant. Whether they belong to the plaintiff or defendant, can only be judicially ascertained upon the trial of the case.

2. The surrender of property to the sheriff, and the payment to him in money of the assessed value of other property, in obedience to process in his hands, issued upon a judgment afterwards reversed, is no admission or acknowledgment of the plaintiff's title. It is an involuntary and compulsory surrender, and cannot be evidence of the plaintiff's title. For this reason, the court erred in overruling the defendant's objection to the testimony of the witness Harris.

3. The defendant proved, that the slaves claimed by the plaintiff had been appraised as a part of the estate of his intestate, in the presence of the plaintiff; and that she did not assert any claim to the property at the time which was heard by the defendant's witnesses. The tendency of this testimony was, to authorize the inference of an admission by the plaintiff from her silence. Her silence on that occasion thus became a fact in the defense of the case; and the question whether she was or was not silent became a material question of fact in the case. Her declarations, asserting her title on the occasion, afford the only possible evidence by which she could protect herself against the inference to be drawn from the proof made

by the defendant. The inference to be drawn was predicated upon her omission to assert her claim while the property was being appraised as a part of the estate of defendant's intestate. The declarations given in evidence were made to one of the appraisers, separately from the rest, during the interval between the valuing of the property and the signing of the bill of appraisement. This evidence conduced strongly to establish the fact, that she did not permit the appraisement of the property claimed by her to be completed, without the assertion of her claim; and was, therefore, properly admitted, for the single purpose for which it was offered, to rebut the proof of her silence. It would have been the duty of the court, to have instructed the jury that no part of the declarations should be considered for any purpose, except to rebut the proof of her silence as to her right on that particular occasion. The defendant did not make such a motion, but asked an exclusion of the entire evidence, and of its different parts. This the court, as we have already decided, properly refused, because it was admissible for a single purpose.

4. The mere omission to assert one's title can never amount to an estoppel, unless the silence operates injuriously to the person in favor of whom the estoppel is asserted. If one, having a title, is present, and remains silent, while another purchases from a third person, in ignorance of such title, the doctrine of estoppel will apply. But there is no room for its application to a case where no action has been predicated, no liability has been incurred, and no loss sustained, in consequence of such silence.—Steele v. Adams, 21 Ala. 534. The defendant in this case does not appear, from the facts proved or hypotheticated in the charge, to have done any act injurious to him, which the open assertion of the plaintiff's title would have prevented.

5. The defense of the statute of limitations was available to the defendant under the plea of *non detinet*.—Lay v. Lawson, 23 Ala. 377.

6. The third and fourth charges, in reference to the statute of limitations, asked by the defendant, were prop-

erly refused. The third charge makes the defense under that statute depend upon a possession and control by the defendant's intestate of the slaves in controversy, *as his own property*. The defendant may have possessed and controlled the slaves as his own property—that is, he may have treated them in every respect as his own property—and yet he may not have held adversely to the plaintiff, or claimed any title in himself. All that the charge contains is not inconsistent with the supposition of a title admitted in the plaintiff, and of a holding for her under a gratuitous bailment incident to the relation in which the plaintiff and the defendant lived towards each other. The vice of the charge is, that it would have authorized a recovery by the defendant, although the possession of the defendant's intestate had been continuously under and for the plaintiff. All that the charge contains may be true, and yet the plaintiff may have a right to recover. The fourth charge is obnoxious to the same objection. That charge merely varies the phraseology, by characterizing the possession of the defendant's intestate as being accompanied by the treatment and control of the slaves by him as his own, and avers a possession in the defendant, as administrator, during the time (which was less than eighteen months) between the commencement of the administration and the institution of the suit.

7. The evidence certainly conduced to show a parol gift, and a delivery to the plaintiff.—See Ivey v. Owens, 28 Ala. 641. However weak the proof may have been, the court properly refused to charge the jury, that it was insufficient to establish a delivery. If there was any proof, it was the province of the jury to determine its sufficiency.

8. There was not only proof conducing to show a parol gift and delivery, but there was also some conflict as to the question, whether the possession of the defendant's intestate was, before his death, adverse; and therefore, the court was not authorized to give the charge, that the jury must, if they believed the evidence, find for the defendant.

The judgment is reversed, and the cause remanded.

BROWN, TOLER & PHILLIPS *vs.* HURT & BRO.

[TRIAL OF RIGHT OF PROPERTY IN SLAVE.]

1. *When irregularity in fi. fa. is available to claimant.*—On a trial of the right of property under the statute, the claimant cannot inquire into the regularity of an execution which is merely voidable, and which has not been quashed or set aside; *secus*, as to an execution which is absolutely void, or which has been quashed or set aside for irregularity.
2. *Difference between void and voidable fi. fa.*—When there is less than fifteen days between the teste and return day of an execution, the writ is not absolutely void, but voidable only, and, until quashed or set aside, is as effectual to create or continue a lien as if it were free from irregularity.

APPEAL from the Circuit Court of Perry.
Tried before the Hon. ANDREW B. MOORE.

THE slave in controversy in this case was levied on by the sheriff, as the property of Robert W. Stone, under an execution in favor of Hurt & Brother. The claimants derived title under a mortgage executed to them by said Stone, dated January 31, 1852, the law-day of which was the 1st May next thereafter; and they proved the validity of their debt, and their possession of the slave at the time of the levy, which was subsequent to the law-day of the mortgage. The plaintiffs' judgment was rendered on the 28th October, 1850, and the following executions were issued on it: 1st, *fi. fa.* tested 23d November, 1850, and returned 23d April, 1851, "no property found"; 2d, *alias*, issued October 13th, 1851, and returned, on the 20th of the same month, "no property found"; 3d, *pluries*, tested February 7th, 1852, and returned April 22d, "no property found"; 4th, *alias pluries*, tested August 23d, 1852, and returned January 10th, 1853, "by consent of parties"; 5th, the writ under which the levy was made, which was issued on the 10th December, 1852, and levied on the same day. "It was proved that the fall term of said circuit court, 1851, to which said *alias fi. fa.* was returned, commenced its session on the 27th October of that year.

The only question made before the court, was as to the lien of plaintiffs' execution. If said lien had been regularly kept up from the date of the first *fi. fa.*, so as to override the lien and title created by said mortgage, then it was conceded by the claimants that the slave was subject to the execution; but, if plaintiffs had lost their lien, by a failure to issue executions from term to term as required by law, so that the claimants' title under said mortgage was unincumbered by the lien of said executions, then it was conceded by the plaintiffs that the claimants were entitled to recover. On the point thus presented, the court charged the jury, that plaintiffs' lien had been regularly kept up by the issue of the executions above set forth, and that they must find a verdict for the plaintiffs." This charge, to which the claimants duly excepted, is the only matter now assigned as error.

I. W. GARROTT, for the appellants, contended, that the lien of the plaintiffs' execution was lost, because there was less than fifteen days between the teste and return day of the *alias;* citing Harris v. West, 25 Miss. 156; Brown v. Higginbottom, 19 Ala. 207; Read v. Markle, 3 Johns. 523; 3 Wash. C. C. 60.

WM. M. BROOKS, *contra*, insisted, that the lien was not lost, inasmuch as there was not the lapse of an entire term between the issue and return of the writs; citing Wood v. Gary, 5 Ala. 43; Albertson, Douglass & Co. v. Goldsby, 28 Ala. 711.

RICE, C. J.—When an execution is not void, but is voidable only, and has not been quashed or set aside, *the claimant*, on the trial of the right of property, cannot inquire into its regularity. However erroneous such execution may be, he cannot collaterally assail it, on such trial. When the execution is a nullity, or when it has been set aside or quashed for irregularity, he may avail himself of that to defeat the plaintiff on the trial of the right of property.—Blount v. Traylor, 4 Ala. 667; Harrell v. Floyd, 3 Ala. 16; Huff v. Cox, 2 Ala. 310; Fryer v. Dennis, *ib.* 144; Bettis v. Taylor, 8 Porter, 564.

2. The case of Chambers v. Stone, 9 Ala. 260, is regarded by us as a conclusive authority for the position, that an execution is not void, merely because there is less than fifteen days between its teste and return day; but voidable only, and may be quashed or set aside. See, also, Allen v. The Portland Stage Co., 8 Greenl. 207; 2 U. S. Dig. 315, § 6; Wilson v. Huston, 4 Bibb, 332; Johnson v. Harvey, 4 Mass. 483.

It is a sound rule, that such execution, being voidable only, and not void, is, *until set aside or avoided*, as effectual to protect the plaintiff, the officer, and a purchaser, and to create or continue a lien, as if it were free from error or objection.—Cogburn v. Spence, 15 Ala. 549; Blount v. Traylor, *supra;* Fournier v. Curry, 4 Ala. 321; Jackson v. Bartlett, 8 Johns. 361; Read v. Markle, 3 John. 523; Woodcock v. Bennett, 1 Cowen, 737. In other words, voidable process stands good, until set aside.

There is nothing opposed to the foregoing views in Brown v. Higginbottom, 19 Ala. 207. That case turned upon a statute, which made the regularity of the proceedings before a justice a requisite to an order by the circuit court for the sale of land levied on by a constable under the justice's execution.

The point actually decided in Harris v. West, 25 Miss. 156, was, that an execution, issued within less than fifteen daps before its return day, might be quashed on motion. That case agrees in that respect, fully, with Chambers v. Stone, *supra.* It is true the court, in that case, say the execution was void. But still the court treated it as voidable only, by quashing it on motion; and we all know, that courts in their language often fail to keep up the distinction between void and voidable process, when, as in the case of Harris v. West, the distinction was not material upon the facts before the court.

According to the views above expressed, the charge of the court below was correct. Judgment affirmed.

HARTSHORN *vs.* WILLIAMS.

[TROVER AGAINST SHERIFF.]

1 *Hearsay inadmissible.*—In trover against a sheriff, for levying an attachment against a partnership on goods claimed by plaintiff under a purchase from one of the partners individually, the declarations of the other partners, to the effect that they had sold out their interest in the goods to their co-partner, are mere hearsay, and, therefore, incompetent evidence.

2. *Admissibility of parol evidence to prove absolute deed a mortgage.*—At law, it is not competent for the grantee of a deed, absolute on its face, to show by parol that it was intended to operate only as a mortgage; but such evidence would be admissible for a creditor assailing the deed for fraud.

3-4. *Validity of absolute deed intended as mortgage.*—A deed absolute on its face, but intended as a mere security for the payment of a debt, is fraudulent and void as to existing creditors; and when its validity is attacked, in a contest between one claiming under it and a sheriff who levied on the property conveyed, the fact that it was intended as a mortgage, in connection with the *bona fides* of the debt, is not admissible to repel the idea of fraud.

5. *Sheriff's liability in trover.*—A right to the immediate possession of personal chattels, under a conveyance which is fraudulent and void as to the grantor's creditors, does not enable the grantee to recover in trover against a sheriff, for levying an attachment on the goods at the suit of the grantor's creditors.

6. *Trespass ab initio by abuse of legal process.*—If a sheriff levy an attachment, in favor of existing creditors of the grantor, on goods claimed by the grantee under a conveyance which is fraudulent and void as to such creditors, his subsequent sale of the goods, without an order of court, does not render him liable to the grantee as a trespasser *ab initio*. (STONE, J., *dissenting*.)

APPEAL from the Circuit Court of Barbour.
Tried before the Hon. C. W. RAPIER.

THIS action was brought by Samuel H. Hartshorn against George W. Williams, to recover damages for the conversion of a stock of goods, on which the defendant, as sheriff, had levied an attachment. The plaintiff claimed the goods under a conveyance from James M. Hamilton, while the attachment levied on them by the defendant was against the firm of J. M. Hamilton & Co., of which said Hamilton was a partner. The plaintiff's conveyance, which was absolute on its face, and which was attacked for fraud by the defendant, recited as its consideration a

debt for $9,560 due to him from said Hamilton; and the evidence showed that this debt was really due from the firm of J. M. Hamilton & Co., and that the deed was only intended to operate as a mortgage to secure its payment. Contemporaneously with the execution of this deed, plaintiff gave Hamilton a power of attorney to act as his agent in the sale of the goods and the collection of the debts; and Hamilton was in possession under this power of attorney at the time the defendant levied on the goods. The goods consisted of "hardware and dry-goods, not of a perishable nature, nor liable to deteriorate or be destroyed before the meeting of the court to which the attachment was returnable, nor liable to induce any charge for keeping"; but the sheriff sold them, without an order of court, a few days before the return of the writ. A portion of the goods had belonged to the firm of J. M. Hamilton & Co.; but, on the dissolution of the firm, Hamilton claimed to have bought out the interest of his copartners, and to have added to the stock on hand by subsequent purchases on his own account. To prove said Hamilton's purchase from his copartners, "plaintiff offered in evidence the declarations of said retiring partners, made after their leaving, and while not in possession, but before the levy of the attachment under which the defendant justified, to the effect that they had sold out to Hamilton; which evidence the court rejected, on the ground that the declarants were competent witnesses; and the plaintiff excepted."

All of the other assignments of error are predicated on the instructions of the court to the jury, which are thus stated in the bill of exceptions:

"1. The plaintiff's counsel, stating that said deed was, in fact, intended only as a mortgage, and would be so used by plaintiff, asked the court to charge the jury, that notwithstanding such intention, and although such was its legal effect in equity; yet, as it purported on its face to be an absolute bill of sale, a court of law must treat and give it effect as an absolute bill of sale. This charge the court accordingly gave.

"2. The defendant having attacked said deed, as an

absolute conveyance, on the ground that it was without consideration and void as against the attaching creditor, the court charged the jury, that if they found there was an out-and-out sale, and that the debt recited in the conveyance had not been, and was not intended to be, discharged; and that the real object and consideration of said conveyance was only to secure plaintiff's debt, and to operate only as a mortgage,—then such object and consideration could not be shown by parol evidence in a court of law, and said conveyance, as an absolute one, would be void for want of consideration provable at law. To this charge the plaintiff excepted.

"3. The plaintiff asked the court to charge the jury, that when said deed is attacked as being without consideration, and as being fraudulent against creditors, because the debt in payment of which it was given was not discharged, then, to repel the idea of fraud, plaintiff may show that it was intended only as a mortgage, and that the debt which it was intended to secure was *bona fide*. This charge the court refused to give, as being inconsistent with the charge above stated which was given at plaintiff's request, and because it was given at his request.

"4. The plaintiff asked the court to charge the jury, that a mortgagee of personal property, claiming under a deed like that in this case, has the right to immediate possession; and if there be no other reason or impediment in the way of his suing, he may maintain trover against any one who has converted the property thereby conveyed. This charge the court refused to give, as being inconsistent with the charge already given at plaintiff's request, excluding all evidence of said conveyance being a mortgage, and because the same was absolute as elected to be treated by plaintiff; and plaintiff excepted to said charge.

"5. The plaintiff then asked the court to charge the jury, that where a sheriff levies an attachment on goods which are not of a perishing nature, nor liable to deteriorate or be destroyed before the meeting of the court to which the attachment is returnable, nor liable to induce any charge for keeping; but, without regard to this, and without any order of sale, he sells such goods only a few

days before the meeting of the court,—in such case, he becomes a traspasser, *ab initio*, and the attachment then ceases to be a protection to him, and (in the absence of other defense) the plaintiff is entitled to recover against the sheriff as a naked trespasser, although his purchase might have been void as against the attaching creditor. The court refused to give this charge, but instructed the jury, that it was not such an abuse of process as would make the sheriff a naked trespasser, nor prevent his justifying under the attachment; to which charge, as well as to the refusal of the charge asked, the plaintiff excepted."

The other charges given or refused require no particular notice. All the rulings of the court, to which exceptions were reserved, are now assigned as error.

L. L. Cato, for the appellant.
Pugh & Bullock, *contra.*

WALKER, J.—The declarations of Gaston and Morris, to the effect that they had sold their interest in the partnership assets, were mere hearsay; were, therefore, inadmissible as evidence, and were properly excluded by the court below.

2. The charge given by the court, to which the plaintiff excepted, asserts these two propositions: that parol evidence was not admissible, at law, to show that an absolute deed was intended to operate as a mortgage; and that a deed of personal property, intended to be a mere security for a debt, would be void, "for want of a consideration provable at law." It is true that, at law, parol evidence is not admissible to transform an absolute deed into a mortgage; but it would be competent, for one assailing the deed for fraud, to show by parol the intention that it should operate as a mortgage. If the effect of this charge of the court was to exclude this view from the jury, it was not injurious to the plaintiff, who certainly had no right to vary the deed by such proof, and who could not have been benefited by so doing.

3. If an absolute deed was intended to be a mere security for the payment of a debt, it is fraudulent and void

as to existing creditors. The law is so settled, upon the clearest reasoning and authorities, in the case of Bryant v. Young & Hall, 21 Ala. 264.—Gregory v. Perkins, 4 Dev. & Bat. 50; Holcombe v. Ray, 1 Iredell, 340. We do not pause to consider whether, under the circumstances presented in the charge, the deed would be void "for want of a consideration provable at law." It is void for *fraud* under those circumstances. The important matter of the charge is, that the deed is void upon the facts supposed; and it could not injuriously affect any person, for the court to attribute its invalidity under the facts to a want of consideration, instead of fraud.

4. As the effect of showing that the deed was intended to operate as a mortgage was to establish fraud, it would, of course, have been improper in the court to instruct the jury, that that fact, in connection with the *bona fides* of the debt, was admissible to repel the idea of fraud. Consequently, the court did not err in refusing the first charge asked by the plaintiff.

5. We are not certain that the next charge refused by the court, numbered 4, might not have been refused on account of its ambiguity. We think the idea intended to be conveyed by it is, that the grantee of the deed, notwithstanding the design that it should operate as a mortgage, had a right to immediate possession; and the objection of a want of such right on his part being thus out of the way, and there being then no other reason or impediment to prevent his suing, the plaintiff might maintain trover against any one who converted the property. This charge, if given, would have authorized a verdict against the defendant, notwithstanding his conversion of the property had been rightful, because perpetrated by him as sheriff, in obedience to lawful process, in favor of the grantor's creditor, as to whom the deed was void for fraud. As a general proposition, the plaintiff may have had the right to the possession of the property, and a right to maintain trover for a conversion of it; and yet that right may have been destroyed, as to the defendant in this suit, by his reception, as sheriff, of process which the law required him to levy upon the property, because

the conveyance was fraudulent as to the plaintiff in the process.

6. It is well-settled law, that one may become a trespasser *ab initio*, by the abuse of an authority given to him by law.—Six Carpenters' case, as reported in Smith's Leading Cases, vol. 1, p. 62, and notes; Wright v. Spencer, 1 Stewart, 576. Several different reasons for this technical rule of law are assigned by the books; but the most satisfactory reason is that given in Bacon's Abridgment, (*Trespass*, B, 451,) where it is thus stated: "Where the law has given an authority, it seems reasonable that the law should, in order to secure such persons as are the objects thereof from abuse of the authority, when it is abused, make everything done void, and leave the abuser in the same situation as if he had done everything without an authority." The reason and policy of the rule fail in criminal cases, and hence its applicability to those cases is denied.—1 Smith's Leading Cases, 62, note; State v. Moore, 12 N. H. 42.

The authority bestowed by the law upon the defendant did not authorize him to interfere with any of the rights of the plaintiff in this case, or to affect any title which the latter had as against the plaintiff in the process. The plaintiff in this case could not be injured by an abuse of the authority. If he has any cause of action against the defendant, it was complete in the instant of the levy; and the amount of his recovery could be neither increased nor lessened by any subsequent irregularity of action on the part of the defendant. We conclude, therefore, that the plaintiff is not within the reason of the rule, and he cannot invoke its aid. There would be an absolute absurdity in the application of the rule to such a case as this. The *gravamen* of the plaintiff's cause of action is, that the defendant has levied process against another person on his property, and that the law gave him no authority whatever for the act; while, in the charge which he asks, he assumes the ground, that the defendant did have authority, derived from the law, to take the property in the outset, but that, in consequence of the subsequent abuse of that authority, that lawful act became a trespass.

We do not intend to say, that there is no conceivable case, in which a sheriff may not, by an abuse of process, become a trespasser *ab initio*, as to one not a party to the process. A sheriff who, by virtue of process against one tenant in common of a chattel, levies upon the chattel, and sells the entirety—the share of the stranger to the process, as well as that of the defendant—has been held a trespasser *ab initio*, as to the tenant in common not a party to the process.—Melville v. Brown, 15 Mass. 82. In that case, the law gave the sheriff an authority to take possession of the entire chattel, and to keep it for the purpose of executing the process; and thus bestowed an authority which affected the tenant in common not a party to the process, and placed him in a situation to be injured by an abuse of that authority. There may be other cases of kindred character; and all such cases fall without the principle of this decision.

In McAden v. Gibson, 5 Ala. R. 341, it was held, that a sheriff's omission to return an attachment deprived him of the right to justify under it, when sued by one not a party to the process. The distinction between that case and this is clearly pointed out by Mr. Justice Bayley, in Shorland v. Govett, 5 Barn. & Cress. 485. The return of the mesne process, or an excuse for the omission to return it, is necessary to constitute the justification, and is a necessary averment in the plea of justification; but it is not so as to the abuse of the authority given by the process. The sheriff makes no averment in his plea of justification, denying an abuse of the authority: that must be brought forward by a replication; and we decide that no party can avail himself of an abuse of authority, when he is not interested in the exercise of it. The rule in McAden v. Gibson is one of mere policy, and adopted in this State upon the weight of authority; and we do not think its extension is demanded by the interests of society, or consistent with justice. Under the authority of that case, the mere *omission* to return process converts the officer into a trespasser *ab initio;* while it is well settled, in all the cases, that an *abuse* of authority must consist of some positive, affirmative act, or of a misfeas-

ance, as contra-distinguished from a nonfeasance, (see the Six Carpenters' case, *supra;*) thus demonstrating, that the decision in McAden v. Gibson stands upon a different ground, and is not based upon the rule applicable to a case where an abuse of authority is relied on to convert a lawful act into a trespass.

The sheriff had the right to levy the attachment, if the conveyance to the plaintiff was fraudulent. The process in his hands clothed him with the right of the plaintiff therein to assert the fraud in the conveyance. His connection with the title was thus so made as to authorize him to assail the title of the defendant's grantee. The right which the process thus gave the sheriff could not be taken away by a misfeasance, which, peradventure, may have been the result of mere mistake, and which could not in any event affect the plaintiff. We cannot perceive either reason or justice in imputing to the sheriff's misfeasance the effect of converting a lawful into an unlawful act, as to one who has no interest whatever in the question whether the sheriff does or does not commit a misfeasance.

The questions raised by the other charges asked and refused, are covered by what we have already said. Upon the principles hereinbefore laid down, there is no error in any of those rulings of the court prejudicial to the plaintiff.

The judgment of the circuit court is affirmed.

STONE, J.—I am not able to agree with my brothers, in one of the conclusions attained by them. In their opinion, they assert the proposition, that the sale of the goods attached, made as it was without any order therefor, had the effect of rendering the sheriff, as against the defendant in attachment, a trespasser *ab initio;* but that the grantee of the defendant cannot take advantage of this rule of law. Whether we regard this question as affected by the adjudged cases, or the reasons on which the rule rests, I think their conclusion alike indefensible.

The following authorities are directly in point, to show that a stranger to the process, whose interests have been injuriously affected by an abuse of such process, may in-

voke the application of the rule established in the Six Carpenters' case: Waddell v. Cook, 2 Hill, (N. Y.) 47; Melville v. Brown, 15 Mass. 82; McAden v. Gibson, 5 Ala. 341. See, also, note to Waddell v. Cook, *supra*, and note to the report of the Six Carpenters' case, 1 Smith's Leading Cases.

I admit the case of McAden v. Gibson does not rest on a *positive* act of abuse. The disability resulted from a mere failure to perform an official duty. In general, a mere *failure* to act does not render a party a trespasser from the beginning, although he received his authority to act from the law. This, however, to my mind, is an argument against the distinction asserted by the majority of the court. Presenting the naked proposition deduced from that decision and this, a sheriff, who is guilty of a *nonfeasance* in failing to return process, forfeits the protection afforded by that process, and strangers may take advantage of such forfeiture; but, if the sheriff take a further step, and be guilty of a *malfeasance* in selling property without any authority therefor, no one but the defendant in such process can be heard to complain. The principle settled in the Six Carpenters' case, which principle underlies all these decisions, gives much greater efficacy to *malfeasance* than to *nonfeasance*.

I think the opinion of my brothers gives undue weight to the word "object," as found in Bacon's Abridgment; and in the absence of any adjudged case which asserts the distinction contended for, I am unwilling to disregard the direct adjudications above cited.

In the second place, I think the opinion of the majority of the court rests on an erroneous principle, in this, that under my construction of it, it makes the sheriff's abuse of authority to operate a privilege in the defendant in the process, and not a disability in the officer. The latter is, I think, the true principle.

I admit that, if Hamilton conveyed his property to Hartshorn, with the intent to delay, hinder or defraud his creditors, such conveyance would be invalid against such creditors. In such case, the sheriff, armed with legal process issued on such debt, would be also armed with

the creditor's right to regard the conveyance as fraudulent; and these facts, without more, would furnish to him a perfect defense to any action brought by the grantee in such deed.

This defense does not rest on the ground that the deed is *void*, and hence inoperative for all purposes. It is only voidable; voidable as against creditors and purchasers of the grantor, but not as against trespassers. Suppose a trespasser should take property, and, when sued for his trespass, should plead that the plaintiff held the goods under a fraudulent conveyance from another. Every one will admit, that the plea would oppose no bar to the action. The sheriff, by abusing his process, forfeits the protection afforded him by that process, and becomes a trespasser. Yet, under the opinion of the majority of the court, this trespasser is allowed to justify his illegal act, by showing fraud in a deed with which he cannot connect himself. An act which is one and indivisible, is, as to Hamilton, a trespass, and punished as such; but, as to Hartshorn, it is lawful and praiseworthy. The law shields the fraudulent grantor, but affords no protection to his grantee. Does not this principle, in effect, allow a mere volunteer—a wrongdoer—to raise the question of fraud in the deed? I admit if the sheriff stood in the position which, independent of the authority under which he seized the goods, would permit him to insist on fraud to avoid the deed from Hamilton to Hartshorn, the distinction drawn by my brothers in this case would be well taken. But he stands in no such position. On the contrary, his only excuse for the seizure lies in the process of attachment; and when, by its abuse, he made himself a trespasser, I think he should be held to all the accountabilities of a trespasser.

The result which I have above pointed out, will follow, whether the deed be actually or constructively fraudulent. Suppose, without any intention to defraud, property should be conveyed by gift; afterwards, a levy may be made on this property to satisfy an antecedent debt of the donor; no matter what irregularities the sheriff may per-

petrate, the donee cannot hold him to his accustomed accountability.

In any point of view, I can find no principle, or adjudged case, justifying the distinction contended for; and I feel it my duty to withhold my assent from the establishment of such a principle. If the rule established in the Six Carpenters' case be a bad one, let it be overturned or qualified, as was done by statute in England.—See Phil. Ev. (3d ed. by Van Cott,) part II of notes, pp. 792–3.

THORPE *vs.* BURROUGHS.

[ACTION TO RECOVER STATUTORY PENALTY FOR ARRESTING RUNAWAY SLAVE.]

1. *Admissibility of slave's declarations.*—The declarations and admissions of a slave, made at the time of his arrest as a runaway, are not competent evidence for the party making the arrest, in an action against the owner to recover the statutory penalty.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by Jonas Burroughs, against Edward R. Thorpe, to recover the statutory penalty for the arrest of an alleged runaway slave belonging to the defendant; and was commenced in a justice's court. On the trial in the city court, as appears from the bill of exceptions, the plaintiff testified to the fact of the slave's arrest, "near the wharf at the lower end of the city, near a swamp, under a shed, with some provisions in his possession"; and was then asked to state "what the slave said to him, at the time of the arrest, as to his being a runaway,—what admissions the slave made as to his being a runaway, and if he did not confess to witness that he was a runaway." The defendant objected to each of these questions; but the court overruled the objections, and

allowed the plaintiff to testify to the slave's confessions; and the defendant excepted. The admission of this evidence is the only matter assigned as error.

C. F. MOULTON, for the appellant.

No counsel appeared for the appellee.

STONE, J.—Under the authority of Mauldin & Terrell v. Mitchell, 14 Ala. 814, it was improper to receive in evidence the declarations of the slave.

The issue formed and tried in this case, presented the question, whether the slave spoken of was or was not a runaway. The testimony offered for the plaintiff, if unexplained, probably made out a *prima-facie* case for him. The testimony of the defendant clearly showed that the slave was at and about the wharf with the knowledge and permission of his owner, and that he had not thrown off his allegiance to him as his master. This proof overturned the plaintiff's *prima-facie* case, and left his proof insufficient to found a judgment upon.

Judgment of the city court reversed, and cause remanded.

ROBBINS *vs.* HARRISON.

[ACTION UNDER CODE ON COMMON COUNTS IN ASSUMPSIT.]

1. *Splitting cause of action.*—An indivisible demand cannot be split up into several causes of action; but a demand for money loaned, and a demand for the price of a chattel sold and delivered, are separate and distinct claims, on which two actions may be maintained.
2. *Plea of former recovery.*—A judgment for or against the plaintiff, in an action for money loaned, is no bar to a subsequent action to recover the price of a chattel sold by him to defendant, although the two claims were existing at the same time.
3. *Conclusiveness of judgment on set-off.*—A defendant, having a cross demand against plaintiff, may use it as a set-off, but is not bound to do so; consequently, the judgment is not conclusive on such demand, unless it was pleaded as a set-off.

4. *Ambiguous charge on effect of judgment as evidence.*—Conceding that the institution of a suit on one demand, by a party having two distinct demands existing at the same time against the same person, would be relevant evidence for the defendant, in a subsequent action on the other demand, as tending to prove a discharge of that demand; yet the court may refuse to instruct the jury, at the defendant's request, that they might look to the former suit "as evidence to show that the claim sued on had been settled."
5. *Delivery of goods and payment on contract of sale.*—A sale of chattels is presumed to have been made for cash, unless some credit is agreed on, and the purchaser cannot demand a delivery of the goods without making payment; but a presumption of payment does not arise from the mere fact of delivery, where nothing is said as to the time of payment.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Richard K. Harrison, against Simeon Robbins, to recover $180 "due from defendant by account on the 1st January, 1850, for two mules and a horse; also, the further sum of $500 for work and labor; also, the like sum for cash advanced by plaintiff, for defendant, and at his request." The defendant pleaded *non assumpsit*, payment, set-off, and former recovery. On the trial, as appears from the bill of exceptions, "the plaintiff proved that, during the year 1850, he sold to defendant two mules and one horse, at the price of $60 each; but the witness said that he had no knowledge or information whether or not the defendant paid for them. The defendant then offered in evidence the record of a judgment from the circuit court of Lowndes county", which is appended as an exhibit to the bill of exceptions, "showing that, in 1851, plaintiff commenced an action against him, before a justice of the peace of said county, to recover the sum of $10 loaned money; that the case was taken by appeal to the circuit court, and that the defendant, under the plea of set-off, there recovered a judgment of $12 68. The defendant offered in evidence, also, the record of a judgment from the circuit court of Autauga county, in his favor, and against the plaintiff in this action, for $201 44", which is also made an exhibit to the bill of exceptions, showing that the action, which was assumpsit, was commenced in April, 1851, and was founded on several promissory notes and an open account;

and that the judgment was rendered, on the verdict of a jury, at the spring term, 1853; but on what issue the cause was tried, or what pleas were interposed, does not appear.

"This was all the testimony adduced on the trial, and thereupon the defendant requested the court to instruct the jury,—

"1. That if they believed from the evidence that the claim sued on in this case was due before the institution of the suit before the justice of the peace in Lowndes county, then the plaintiff would not be entitled to recover in this action.

"2. That the jury may look to the suit brought by plaintiff before the justice of the peace in Lowndes county, as evidence to show that the claim here sued on had been settled, should they believe that the plaintiff's claim in the present action was due before the suit in Lowndes county was instituted.

"3. That, although they might believe all the evidence offered by the plaintiff, the plaintiff was not entitled to recover.

"4. That if they believed all the evidence in the case, plaintiff could not recover."

The rulings of the court in refusing to give these charges, to which exceptions were reserved by the defendant, are the only matters now assigned as error.

J. D. F. Williams, and Wm. M. Byrd, for appellant.

Geo. W. Gayle, and Watts, Judge & Jackson, *contra.*

WALKER, J.—An indivisible and entire cause of action cannot be split up into several causes of action; and therefore, a recovery upon a part of such entire cause of action will bar a suit upon the residue. But, where a party has two separate and disconnected causes of action against the same person, he may bring separate suits upon them; and a recovery, or a failure to recover, upon one, will not defeat a recovery upon the other in a different suit.—Wittick v. Traun, 27 Ala. 562; O'Neal v. Brown, 21 Ala. 482; Oliver v. Holt, 11 Ala. 574; De Sylva v.

Henry, 3 Porter, 321; Locke v. Miller, 3 S. & P. 14; Louw v. Davis, 13 John. 227; Brockway v. Kinney, 2 John. 210; Rex v. Sheriff, 1 B. & Adol. 672, (20 E. C. L. 466;) Badger v. Titcomb, 15 Pick. 409; Colvin v. Corwin, 15 Wend. 557.

The plaintiff's claim for ten dollars, on account of money loaned, and his claim for one hundred and eighty dollars, on account of the sale of two mules and a horse, were separate and distinct causes of action; and a judgment for or against the plaintiff, in a suit for the recovery of the former, would be no defense to a subsequent suit upon the latter claim.

A defendant, having a right of set-off, or cross action, may, at his election, bring it forward in the suit against him, or bring an independent suit upon it. The rule that a judgment is conclusive, not only as to every matter determined, but as to every matter which might have been set up as a defense to the cause, does not include rights of set-off. A defendant is not bound to plead his set-off; though, if he pleads it, a decision against him is conclusive. See Guen v. Governeur, 1 John. Cas. 501; Phinney v. Earl, 9 John. Rep. 352; Minor v. Walter, 17 Mass. 238.

It follows that the omission of the plaintiff to bring forward his claim sued upon in this case, as a defense to the defendant's action against him in the circuit court of Autauga county, would not bar the present action.

It may be that the fact of the plaintiff's having brought a previous suit upon another demand, omitting the demand in this case, though due, would be admissible evidence, as conducing to show a discharge of the demand in this case. It would certainly, however, be entitled to but slight influence upon the question of payment or settlement; especially where, as in this case, the demand first sued upon was within a justice's jurisdiction. But the second charge asked was not that the former suit was evidence conducing to show that the demand sued upon was settled; but that the former suit was evidence to which the jury might look to show that the demand was settled. The meaning of this charge is ambiguous. It is susceptible

of the construction, that the jury might regard the evidence as actually showing a settlement of the demand. The charge was certainly ambiguous, and calculated to mislead the jury; and, therefore, the court did not err in its refusal.—Partridge v. Forsyth, 29 Ala. 200; Salomon v. The State, 28 Ala. 83.

When no credit is agreed upon, a sale of chattels will be regarded as having been made for cash; and the purchaser will not be entitled to delivery, as a matter of right, without making payment. But a presumption of payment does not arise from the mere fact of delivery, when nothing is said as to whether the sale is for cash or on credit. Such a presumption would impose upon the seller, in every case, the *onus* of proving a negative—that a payment was not made.

What we have said disposes of the several questions in this case, and leads us to the conclusion, that there was no error in the charges given, or in the refusals to charge as shown in the bill of exceptions.

The judgment of the court below is affirmed.

STONE, J., not sitting.

DUCKWORTH'S EX'RS *vs.* BUTLER AND WIFE.

[FINAL SETTLEMENT AND DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *What constitutes advancement or ademption of legacy.*—Where the husband's slaves, being under mortgage, are redeemed by his father-in-law, at his request, upon the understanding and agreement that they should be conveyed by deed to the wife, and are afterwards so conveyed to her; the redemption money being either furnished by the husband, or by his father-in-law on his credit and promise to repay,—this is neither an advancement to the wife by her father, nor an ademption or satisfaction, in whole or in part, of a legacy to her under a will previously executed by him.
2. *Presumption in favor of judgment.*—To authorize the reversal of a judgment on error, the record must affirmatively show that the action or ruling of the primary court was wrong: it is not enough that the appellate court cannot see that such action or ruling was right.

APPEAL from the Probate Court of Dallas.

IN the matter of the final settlement and distribution of the estate of Randall Duckworth, deceased, under his last will and testament, which was dated the 4th April, 1840, and which was duly admitted to probate after his death in May, 1851. In this will, the testator declared it to be his intention that his estate should be divided equally among his children; charging each with advancements made by him in his lifetime, which were particularly specified. The advancements made by him to Mrs. Delphia Butler, one of his daughters, were stated in the will to amount to $220; but, in addition to this sum, it was insisted by the executors and other legatees, that she was chargeable with the value of five negroes, which were conveyed by the said testator, by deed of gift bearing date November 2, 1844, to a trustee, for her sole and separate use. An issue on this point being made up between the parties, "the questions both of law and fact were submitted to the court, without the intervention of a jury"; and on the evidence adduced, the material portions of which are stated in the opinion of the court, and, therefore, require no particular notice here, the court refused to charge Mrs. Butler either with the value of these slaves, or with the amount paid by the testator for them. The executors excepted to this decision of the court, and they now assign it, with other things, as error.

BYRD & MORGAN, and D. S. TROY, for the appellants.
GEO. W. GAYLE, *contra*.

RICE, C. J.—The main controversy is in relation to the negroes mentioned in the deed of Mrs. Butler's father, dated 2d November, 1844, and the money paid on account of them to Bragg. From the evidence, we believe that the negroes originally belonged to the husband of Mrs. Butler; that he mortgaged them to Bragg; that they were redeemed by her father, at the request of her husband, and upon the understanding and agreement that they should be conveyed as they were conveyed by the said

deed of November 2d, 1844; and that the redemption was effected with money either belonging to her husband, or furnished upon his credit and promise to repay. The negroes of the husband, redeemed and conveyed by the father of his wife in accordance with such an understanding and agreement, cannot be justly regarded or treated as negroes conveyed by her father to her by way of advancement. The transaction is, in substance, a provision by the husband conferring a separate estate in the negroes upon his wife. Her father is used as a conduit to pass the title of the negroes, from the husband and Bragg, to the trustee named in the deed of November 2d, 1844, for her benefit. Under such circumstances, that deed cannot be regarded as a conveyance of the negroes by her father to her, by way of advancement, nor as an ademption or satisfaction, either in whole or in part, of her legacy under his will bearing date prior to the date of the deed.—May v. May, 28 Ala. R. 141; Grey v. Grey, 22 *ib.* 233; Walton v. Walton, 14 Vesey, 324; 2 P. W'ms' Rep. 357; Newnan v. Wilbourne, 1 Hill's Ch. R. 10; Green v. Howell, 6 Watts & Serg. 203.

If the money, with which her father redeemed the negroes from Bragg, was his own money, and not the money of her husband, the evidence shows that he paid it out under the agreement and understanding above mentioned, and upon the promise of her husband to refund it. Money of her father, thus paid out, may create a debt against her husband, but cannot be regarded as an advancement by her father to her, nor as an ademption or satisfaction, either in whole or in part, of her legacy under the will of her father bearing date prior to the payment.

2. The offer of the executors to read in evidence the answer of Randall Duckworth, one of the executors, to the bill in chancery, or such portions of the answer as were responsive to the bill,—the bill not being in evidence, was rejected by the court. We cannot say there was error in that respect. The answer is not set out, and the bill was not in evidence. And it is impossible for us to say, under these circumstances, that the whole answer, or

every responsive portion thereof, was legal and relevant evidence. As we cannot say that, we cannot say there was error in rejecting the offer. We cannot reverse merely because we cannot see that the court below acted correctly. To authorize a reversal, it must appear from the record, that the action or ruling of the court below was wrong. The record does not show that any ruling of the court below, excepted to by the appellants, was wrong; and the judgment must be affirmed.

ALLMAN AND WIFE *vs.* OWEN.

[BILL IN EQUITY TO ENJOIN DECREE OF PROBATE COURT.]

1. *Laches of plaintiff bars equitable relief against judgment at law.*—A guardian, against whom a final decree, in accordance with the account current filed by himself, has been rendered at a regular term of the probate court, cannot come into equity, to obtain credit for a payment, made by him after the filing of his accounts, but before the rendition of the final decree, on the ground that the cause was continued from term to term, by tacit consent, to enable the ward to file objections to his account current; that he once made application to the clerk for the papers, to see whether any objections had been filed, and was informed that they were in the hands of the ward's attorney; and that the decree was afterwards rendered in the absence of both parties, and without notice to them.
2. *Judicial notice of time.*—Courts will take judicial notice of the coincidence of days of the month with days of the week, as shown by the almanac.
3. *Notice of rendition of decree.*—A guardian, who has filed his accounts for settlement in the probate court, is bound to attend the court, from term to term, until his cause is disposed of, and has no right to special notice of the time when a decree will be rendered.

APPEAL from the Chancery Court of Lawrence.
Heard before the Hon. JOHN FOSTER.

THE bill in this case was filed by Franklin C. Owen, the appellee, alleging that, at the June term, 1854, of the probate court of Lawrence, he filed his accounts and vouchers for a final settlement of his guardianship of

Martha A. Couch, (who had then recently intermarried with Jeremiah Allman,) showing a balance of $966 13 in favor of his said ward; that the probate court thereupon appointed the 2d Monday in August, 1854, for the auditing, stating, and final settlement of said accounts; that Allman expressed his intention of contesting the account filed by complainant, and thereupon, by consent of parties, the cause was continued until the next regular term, in order that he might have an opportunity to examine the account, and to file his written objections thereto; that before the continuance of the cause, at the solicitation of Allman, complainant paid over to him $924, a part of the admitted balance due to the said ward, and took his receipt for the same; that Allman did not appear at the next regular term of the court, and the cause was then continued, with complainant's consent, under the belief and expectation that objections to his account would yet be filed; "that from that time on, for many months, the cause was continued by the court, on the tacit consent of the parties, from term to term"; that complainant's attorney made application to the probate judge, on several occasions, to know whether any objections had been filed to his account, and was informed that none had been filed; that complainant himself, on one occasion, applied to the clerk of the court to ascertain the condition of the case, and was informed that the papers were all in the hands of Allman's attorney; that it was his intention, whenever his account was finally passed on, to present Allman's receipt above referred to, and obtain a credit for the amount of the payment; that at the August term, 1855, in vacation, the clerk of said court, without the knowledge or consent of either party, admitted said account to record without alteration, and rendered a decree against complainant for the entire balance thereby shown in his hands; and that an execution had issued on this decree. The prayer of the bill was for a perpetual injunction of this decree, except as to the small amount really due to the plaintiffs therein, and for other and further relief according to the exigencies of the case.

A transcript of the record of the probate court, show-

ing the proceedings had in the settlement of the guardian's accounts, was appended as an exhibit to the bill. Its material portions are stated in the opinion of the court.

The defendants answered the bill, demurring to it for want of equity, and stating facts which require no particular notice.

On final hearing, the chancellor overruled the demurrer to the bill, and rendered a decree in favor of the complainant; and his decree is now assigned as error.

D. P. LEWIS, for the appellant.—1. The bill shows on its face, that the decree sought to be enjoined is void, because rendered by the clerk of the court. Chancery will not enjoin a void judgment, against which the defense at law is complete.—2 Metcalf, 135; 1 Sm. & Mar. Ch. 374; 3 Stewart, 280; 1 Johns. Ch. 49; 5 Sandf. 612; 2 Dev. Ch. 234.

2. If the decree is not void, it is conclusive as to all matters existing at the time of its rendition, and the complainant shows no excuse for equitable relief against it. Mervine v. Parker, 18 Ala. 176; Landreth v. Landreth, 12 Ala. 640; Carroll v. Moore, 7 Ala. 615; Lee & Norton v. Bank of Columbus, 2 Ala. 21; English v. Savage, 14 Ala. 343; Sanders v. Fisher, 11 Ala. 812; Smith v. Miller, 3 Stewart, 280; 6 Porter, 24; 7 Porter, 549; Watson v. Hutto, 27 Ala. 513; 7 Cranch, 232; 3 Atk. 223; 3 Leading Cases in Equity, (by White & Tudor,) 97–106.

R. O. PICKETT, *contra*, contended that the bill made out a clear case for equitable relief, and cited 3 Stewart, 155; 2 Stew. & P. 58; 2 Porter, 177; 5 Porter, 547; 6 Porter, 24; 2 Ala. 21; 7 Ala. 549, 666; 9 Ala. 120; 10 Ala. 149; 16 Ala. 423.

WALKER, J.—In French v. Garner, 7 Porter, 549, it, following the decision of Chancellor Kent in Duncan v. Lyon, 3 John. Ch., held it to be "a settled principle, that a court of equity will not interfere after a judgment at law, unless the party can impeach the justice

of the judgment, by facts or on grounds of which he could not have availed himself, or was prevented from doing it by fraud, or accident, or the act of the opposite party, unmixed with negligence or fraud on his part." The same principle has since been repeatedly asserted, and a determination to adhere to it, notwithstanding it may work hardships in particular cases, has been expressed.—Lee & Norton v. Ins. Bank of Columbus, 2 Ala. 21; Saunders v. Fisher and Phelps, 11 Ala. 812; English v. Savage, 14 *ib.* 343; Watson v. Hutto, 27 Ala. 513; Burden v. Stein, at the last term.

This principle rests upon a sound and conservative policy. It exacts diligence from litigant parties, and makes the judgments of courts, in most instances, an end of litigation. From such a principle we must not be driven by the appeal which the hardship of its application to the appellee may make in his behalf. The payment was certainly a legitimate and proper ground for a credit, and was a matter of which the appellee might have availed himself in the probate court. There is no pretense that he was prevented by the fraud or act of the opposite party from bringing before the court his just claim to the credit. The excuse for not asserting the right to the credit in the probate court is, that the decree was rendered in vacation, without the knowledge of the appellee or his attorney, or of the opposite party, when the cause had long been continued from term to term by the tacit consent of both parties, in order that exceptions might be filed for the ward; and that the appellee was on one occasion told by the clerk of the probate judge, that the papers were all in the hands of the attorney of the opposite party. There appears to have been no proof adduced.

The averment of complainant's bill, that the decree of the probate court was rendered in vacation, is not sustained by the transcript from the record of the probate court exhibited with the bill. That transcript of a record, which, at least in the absence of proof to the contrary, imports absolute verity, shows that the settlement was ordered to take place at a regular term of the probate

court, on the second Monday in August, 1854; and that there was a continuance from term to term, each month, to the 13th of August, 1855. The Code (§ 673) requires regular terms of the probate court to be held on the second Monday of each month. The continuance at each succeeding month is headed by the name of the month, followed by the word term; thus, "August term," "September term," &c. By these entries we must understand the regular term appointed by law. We will judicially take cognizance of the fact disclosed by the almanac, that the 13th of August, 1855, when the decree was rendered, was the second Monday of the month.—1 Greenleaf on Evidence, § 5; Harvy v. Broad, 2 Salkeld, 626. It thus appears from the record, that the cause was continued at each regular monthly term, until the regular monthly term in August, when the decree was rendered. The averment of the bill, in the face of the record, that the decree was rendered in vacation, is unsustained by proof; and the omission of the answer to respond to the averment is not an admission of it, because it appears, both from the bill and the answer, that it was a matter as to which the defendants were ignorant. We cannot, therefore, regard the allegation, that the decree was rendered in vacation, as an established fact in the case.

The allegation that the papers were in the possession of the attorney of the opposite party, if it be at all material, is denied in the answer, upon information and belief, and not proved.

It was the complainant's duty to attend the court, from term to term, while his cause was pending in it. It was not the duty of the probate judge to specially notify him of the term at which the decree was rendered; and if he hazarded his interest upon the unauthorized expectation of such notice, he has been guilty of laches, against which the law gives him no relief.—Burden v. Stein, at last term. From term to term, for twelve months, he omits to present to the court his claim to a credit; and finally, at a regular term of the court, he is absent, and the probate judge renders a decree in accordance with the account filed by himself. If injustice has been done, it is charge-

able, so far as the record discloses, to the complainant; and he cannot be relieved, without violence to the sound and conservative principle above stated.

The decree of the court below is reversed, and a decree must be here rendered, dismissing complainant's bill; and the appellee must pay the costs in this court, and in the court below.

QUARLES *vs.* GRIGSBY.

[CREDITOR'S BILL AGAINST FRAUDULENT GRANTEE OF DECEASED DEBTOR.]

1. *When creditor may come into equity against fraudulent grantee of deceased debtor.* A judgment creditor, not having exhausted his legal remedies, cannot come into equity, to subject property fraudulently conveyed by the debtor in his lifetime, without alleging and proving a deficiency of legal assets: if his bill shows on its face that, although the debtor's estate has been reported and decreed insolvent, there are outstanding legal assets which never came to the possession of the administrator, it is without equity.

APPEAL from the Chancery Court of Marengo.
Heard before the Hon. WADE KEYES.

THIS bill was filed by Samuel Quarles, the appellant, against James B. Grigsby, Jr., Edwin A. Glover, and John N. Ransom, as administrator of James B. Grigsby, deceased; and sought to subject to the satisfaction of a judgment, obtained by complainant at the spring term, 1843, of the circuit court of Perry county, against said Ransom, as administrator of Grigsby, certain slaves which were alleged to have been fraudulently conveyed by said decedent to said James B. Grigsby, Jr., who was his son, and to be in the possession of said Glover, as guardian of said James B. Grigsby, Jr. The decree of the chancellor, dismissing the bill for want of equity, is the only matte assigned as error.

WM. M. BROOKS, for the appellant.—It was not necessary to sue out an execution on plaintiff's judgment, to entitle him to the aid of a court of equity against a fraudulent grantee. A judgment creditor may file such bill at any time. The bill alleges, that all the assets in the hands of the administrator, against whom the judgment was rendered, had been fully administered. An execution on the judgment could not have been levied on the slaves sought to be subjected, which had never come to the possession of the administrator, but were in the possession of the fraudulent grantee.—Weir v. Davis & Humphries, 4 Ala. 442; P. & M. Bank v. Walker, 7 Ala. 926; Dargan v. Waring, 11 Ala. 988.

LOMAX & PRINCE, *contra.*—The plaintiff was not entitled to the aid of chancery, until he had exhausted his legal remedies by a return of *nulla bona* on an execution. Pharis v. Leachman, 20 Ala. 662; Roper v. McCook, 7 Ala. 318; 4 Johns. Ch. 671, 682; 2 *ib.* 283; 6 Gill & John. 424; 4 Munford, 539. The report and decree of insolvency does not, as against Grigsby, establish the insolvency of the estate. Moreover, the bill admits that many valuable slaves, of which the intestate died possessed, and only a portion of which are in Grigsby's possession, never came to the hands of the administrator. By not pleading to the action, the administrator admitted assets, and was therefore individually liable.—2 Porter, 236; 3 Stewart, 285.

STONE, J.—The bill in this case was dismissed by the chancellor, for want of equity; and hence the record contains nothing but the bill, its exhibits, and the decree of the chancellor. No reason is given in the decree for the judgment of the court; but several reasons are here urged in support of it. We will notice but one.

The bill alleges, that the debt of Grigsby was reduced to judgment against Ransom, the administrator *de bonis non*, in the year 1843; and there is no averment that any execution was ever sued out on that judgment. The bill further alleges, that after that time, (how long after we are not in-

formed,) Ransom reported the estate insolvent; and that on that report the orphans' court declared it insolvent. The bill further avers, that "after exhausting all the effects which came to the possession of said administrators, or either of them, and after deducting the distributive share of your orator as allotted to him under the decree of said orphans' court," there remained, and still remains, due to complainant a large balance. The bill nowhere charges that there is not property subject to levy under execution, if complainant were to sue out such final process on his judgment. For aught that appears on the face of the bill, there may be property subject to levy, which is amply sufficient in value to pay off the complainant's demand; and yet that property may never have *come to the possession of said administrators.* So far from negativing this view, the bill expressly charges, that the "intestate, at the time of his death, was possessed of divers valuable negro slaves, which never came to the possession of said administrators or either of them, and were not in any manner applied in payment of the debts of said intestate."

It may be urged in answer to this, that the slaves claimed by James B. Grigsby, Jr., and which are sought to be condemned by this bill, were placed beyond the reach of the administrator by the deed of the intestate, executed in 1836. The correctness of this position may be conceded without affecting the result of this case.—See Pharis v. Leachman, 20 Ala. 662; Watts v. Gayle & Bower, *ib.* 817, and authorities cited. The bill does not aver, that *all* the "valuable negro slaves" owned by intestate at the time of his death, and which have not been "applied in payment of the debts," are in this condition. The charge in the bill is, that "James B. Grigsby, Jr., a son of said intestate, at or about the time of the death of said intestate, seized and took into possession, either by himself or through his agents and friends, a certain number thereof, named as follows," &c. The clear import of this language is, that there were slaves of the intestate, not reduced to possession by the administrator, and which *were not seized or taken into possession by James B. Grigsby, Jr., or his agents or friends.*

In what condition these slaves are held—whether under any, and what description of claim, we are wholly left to conjecture. Conceding the bill to be true in all its parts, these slaves may be free and unincumbered, and subject to levy under execution against the administrator *de bonis non*.

The bill fails to make a case for equitable interposition; and the decree of the chancellor is affirmed.—See State Bank v. Ellis, at the January term, 1857.

Let the appellant pay the costs of this appeal.

LEDBETTER *vs.* WALKER.

[BILL IN EQUITY BY PURCHASER TO OBTAIN CONVEYANCE OF LAND.]

1. *Agent's authority to sell land.*—A verbal authority is sufficient to authorize an agent to sell land; and if he executes a bond for title in the name of his principal, the writing will take the case out of the statute of frauds, and justify a specific performance against the principal.
2. *What constitutes defense of purchaser for valuable consideration without notice.* When a party sets up the defense of being a purchaser for valuable consideration without notice, his answer must contain a positive denial of notice, and of all the facts and circumstances charged in the bill from which notice may be implied.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Alexander H. Ledbetter, against N. W. Cocke, Jethro Walker, and Cleveland Croft; charging the perpetration of a fraud by said Walker and Croft, in combining together to procure from said Cocke the legal title to a tract of land, which complainant had previously purchased from one Kimball, who was Cocke's agent; praying the cancellation of Croft's deed from Cocke, and the vesting of the legal title in the complainant, or that Croft might be held a trustee for complainant; and adding the general prayer for other and further relief.

A decree *pro confesso* was entered against Cocke. The other defendants answered, denying the charge of fraud; and Croft set up the defense of being an innocent purchaser, for valuable consideration, without notice of complainant's equitable title. On final hearing, on pleadings and proof, the chancellor dismissed the bill, holding that the evidence was not sufficient to charge Croft with notice, actual or implied, of complainant's prior equity; and his decree is now assigned as error.

GEO. W. GUNN, for the appellant.

JAS. E. BELSER, *contra.*

WALKER, J.—Kimball's authority, as the agent of Cocke, to sell the land in controversy, is an established fact in this case. That authority was verbal. A verbal authority is sufficient to authorize the performance of any act, which is not of such a nature as to require that it be done under seal. A contract to sell land may be valid, and may transfer the equitable title, although the writing which evidences the contract may not be under seal. If an agent, having a verbal authority, should make the contract by deed, which would have been valid if made by writing without a seal, the contract will enure as a simple contract, and the writing will take the contract out of the statute of frauds.—Dunlap's Paley on Agency, 157, note A; Cocke v. Campbell & Smith, 13 Ala. 286; Tapley v. Butterfield, 1 Metcalf, 515; Robinson v. Garth, 6 Ala. 204; Story on Agency, § 50. From these principles it results, that the fact of Kimball's authority being merely parol does not impair the complainant's right to relief in this case.

2. It is conceded that complainant's equitable title is older than the defendant's (Croft's) legal title; but it is insisted, that Croft is an innocent purchaser, for valuable consideration, without notice of the complainant's equity, and that therefore he is entitled to the protection of the chancery court. To make out the defense of innocent purchaser for value, it is said, in a well considered decision of the Supreme Court of the United States, to be neces-

sary that the purchaser should state the deed of purchase, the date, parties and contents, briefly; and that the vendor was seized in fee, and in possession; and should state the consideration, with a distinct averment that it was *bona fide* and truly paid, independent of the recital of the deed; and should deny notice, previous to and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, should deny all circumstances referred to from which notice can be inferred.—Boone v. Chiles, 10 Peters, 177; see, also, Johnson v. Toulmin, 18 Ala. 50. "The notice must be positively, and not evasively denied, whether it be or be not charged by the bill. If particular instances of notice, or circumstances of fraud, are charged, the facts from which they are inferred must be denied, as specially and particularly as charged. If the conveyance pleaded be of an estate in possession, the plea must aver, that the vendor was in possession at the time of the execution of the conveyance. The plea must also distinctly aver, that the consideration money mentioned in the deed was *bona fide* and truly paid."—2 Sugden on Vendors, 354–355–359, chap. XVIII.

Tested by the principles above stated, the answer fails to make out the defense. It nowhere denies that the defendant Croft, at the time of his purchase, had *notice* of the previous purchase by the complainant. The denial which appears from the answer to be relied upon is in the following language: "He denies that he *knew*, at the time of said purchase by him of the said Cocke, that the said complainant had then bargained for the said land with the said Kimball." There is a difference between the want of *knowledge*, and the want of *notice*. He may have been *notified*, without being made to *know* of the complainant's purchase. The bill expressly charges, that Croft, at the time of his pretended purchase, was *informed* and *advised* of the authority and agency of Kimball, and of the sale by him to the complainant. The answer avers, that Croft knew nothing of the *authority* of Kimball. Conceding that, by a liberal construction, this amounts to a denial of notice of Kimball's agency, the answer

nowhere meets and responds to the allegation that Croft was *informed* and *advised* of the sale by Kimball. The omission to answer this allegation, is an admission of it. If Croft was informed of the sale by Kimball to the complainant, that, together with the other circumstances in this case, was sufficient to put him upon inquiry, whether he knew of Kimball's agency or not. The effort here is, to manufacture the defense of innocent purchaser out of facts not quite sufficient to authorize it; and there is a resemblance which it requires care and scrutiny to distinguish from the reality, but it is a mere resemblance.

It is established by the answers and proof, that the owner of the land resided in Montgomery, and had Kimball as his agent in the vicinity of the land in Tallapoosa county; that the defendant Walker applied to Kimball, after, and on the same day with, the complainant's purchase; that, upon being informed of complainant's purchase, he became excited, and declared his intention to circumvent the complainant; that he went forthwith to Croft, his son-in-law, who had never seen the land and knew nothing about it, and procured him to go to Montgomery, and purchase the land for him,—promising that if he would get a good title to it, he would give him (Croft) four hundred dollars, and that Croft could thus have the difference between the sum for which he might buy the land and the four hundred dollars; that Croft accordingly went to Montgomery, and bought the land, before the owner was informed of complainant's purchase, taking the title in his name, and paying the purchase-money, three hundred and twenty dollars; and that Walker afterwards entered upon the land, and cut timber. Waiving the question, whether, upon these undisputed facts in the case, the chancery court ought to hold Croft, though a purchaser without notice, a trustee for the complainant, or permit Walker to accomplish his fraudulent purpose through the instrumentality of Croft; we must at least regard it as exceedingly improbable, that Croft went to Montgomery, and bought the land for his father-in-law, under such circumstances, without some information of the purpose to defeat the purchase by the

complainant; and we are authorized, upon the admitted facts, to exact from Croft the clearest and most explicit denial of notice.

It is due to the chancellor who decided this case to say, that we have not dissented from his opinion as to the law in any respect; that upon the question of agency, we have followed him; and that the artful omission of the answer to meet the question of *notice*, does not appear to have been brought to his attention, or to have been considered by him.

The decree of the chancellor is reversed, and we proceed to render what we deem the proper decree in the case. It is ordered, adjudged, and decreed, that all the right and title, either at law or in equity, vested in the defendants Croft and Walker, or either of them, to a certain tract of land situated in Tallapoosa county in the State of Alabama, known and described as the north-east quarter of section eighteen (18), township nineteen (19), of range twenty-three (23), be divested out of them respectively, and vested in the complainant, upon the complainant's paying to the registrar of the chancery court for the thirteenth chancery district of the State of Alabama the sum of two hundred and fifty dollars, with interest on one half of that sum from the first of January, 1853, and on the other half from the first of January, 1854; that the said registrar shall pay over the said sum of money to the defendant Croft, and take his receipt for the same; and that defendant Cocke shall deliver the two notes, each for one hundred and twenty-five dollars, given to him for the purchase of said land by the complainant, which are described in complainant's bill, to the said registrar, to be canceled: and that said registrar shall report to the next term of the chancery court of said chancery district.

It is further ordered, adjudged, and decreed, that the defendants Walker and Croft pay the costs of this court, and in the court below; and the cause is remanded to the court below, for further proceedings in the execution of the foregoing decree.

Rice, C. J., not sitting.

JONES *vs.* BLALOCK.

[BILL IN EQUITY FOR SPECIFIC PERFORMANCE OF AWARD, AND INJUNCTION OF JUDGMENT AT LAW.]

1. *Administrator's power to submit to arbitration.*—In this State, an administrator has power to compromise or submit to arbitration an action brought by him for the recovery of chattels belonging to his intestate's estate.
2. *Construction of submission and award.*—A pending action of detinue, brought by an administrator against one of the distributees of the estate, was submitted to arbitration, under an agreement to which the other distributees were parties, and by which it was stipulated, that the arbitrators should allot to each distributee his or her distributive share of the estate, and make such allowances between the parties as might be demanded by good conscience and fair dealing; that the distributive share of each should be liable to the demands of the administrator ratably for the expenses of the administration; and that the records, inventories, decrees, and settlements of the court, should be made pursuant to the award. The arbitrators awarded, that the administrator should have a judgment in the action of detinue, for all of the slaves in controversy, with a specified sum as damages, and a portion of the costs; and divided the slaves into four lots, which they awarded to the respective distributees. *Held*, that the share of each distributee was liable under the judgment for its ratable proportion of the expenses of administration, and did not become the absolute property of the distributee until he had paid or tendered such portion of the expenses.
3. *Specific performance of award.*—A party is entitled to come into equity, to compel the specific performance of an award, and to obtain the protection of the court by injunction until the award can be specifically performed, whenever he cannot obtain at law all that was intended to be given to him by the award.

APPEAL from the Chancery Court of Lawrence.
Heard before the Hon. JOHN FOSTER.

THIS bill was filed by Mrs. Sarah Jones, one of the distributees of the estate of Joseph K. Blalock, deceased, against the administrator and other distributees of said estate. Its material allegations were, that in August, 1853, John C. Blalock, the administrator of said estate, instituted an action of detinue against complainant, for the recovery of certain slaves which he claimed as belonging to his intestate's estate; that this action, with all other matters of controversy growing out of said estate,

was, on the 24th November, 1853, by written agreement between the parties thereto and Thomas J. Blalock, another one of the distributees, submitted to arbitration; that the submission was afterward verbally modified, so as to allow Theophilus Jones, who was a son of complainant but not a distributee of the estate, to participate in the division of said estate equally with the other parties; that the arbitrators afterwards made their award in writing, which was accepted and approved by all the parties; that the award, with all the papers relating thereto, was handed over to the administrator, in order that he might have it entered of record, pursuant to the submission, as the judgment of the court; that the administrator fraudulently concealed and withheld from the court a portion of the award which directed a division of the slaves in controversy among the several parties, and had a judgment entered up in his favor, pursuant to another portion of the award, for all the slaves in controversy, with damages for their detention, which judgment he is seeking to enforce; and that complainant delivered up the slaves as she was required to do by the award, paid the money which she was required to pay, and performed everything else which the award directed her to perform. The bill prayed a perpetual injunction of the judgment at law, and added the general prayer for other and further relief.

The submission and award, as exhibited with the bill, were as follows:

"State of Alabama, } Whereas John C. Blalock, admin-
Lawrence county. } istrator of the estate of Joseph K. Blalock, deceased, has sued Thomas J. Blalock and Sarah Jones for certain slaves, claiming them as the property of said decedent, which said suits are now pending in the circuit court of Lawrence county: Now, to the end that justice may be done to all the parties, we, whose names are hereunto *assigned*, viz., John C. Blalock, administrator of J. K. Blalock, deceased, Thomas J. Blalock, and Sarah Jones, mutually agree to submit the matters litigated therein to the following persons," (naming them,) "whose award shall decide the same. And for the purpose of saving costs of witnesses at said arbitration, it is admitted,

1st, that the slaves claimed in said suits [are] the property of the estate of Joseph K. Blalock, and subject to said administration; 2d, that the said arbitrators shall settle the matter of hire, and allot to each one his or her distributive share of said estate, and make such allowance between the parties as good conscience and fair dealing may demand; 3d, that the distributive share of each shall be liable to the demands of said administrator ratably for the expenses of said administration; and that the records, inventories, decrees, and settlements of the courts, shall be in accordance with, and pursuant to said award. Given under our hands," &c.

"The State of Alabama, } We, whose names are above
Lawrence county. } mentioned as arbitrators, met by appointment at the house of Thomas J. Blalock, on Thursday, the 24th day of November, 1853, for the purpose of adjusting the matters in law aforementioned; and, after being duly sworn according to law, do decide and make this our final award in manner and form as follows: 1st. We decide and award that the administrator, John C. Blalock, recover of the other parties, viz., Sarah Jones, the following slaves, of the following value:" (specifying the slaves by name, and fixing the separate value of each;) "also, one thousand and fifty-six dollars in money, which she is due the estate of said Joseph K. Blalock, deceased, together with three-fourths of the costs that may have accrued in the premises; and that the records of the circuit court of Lawrence county conform to this award. Given under our hands," &c.

That portion of the award which is alleged to have been suppressed by the administrator, as the same is exhibited with the bill, was as follows:

"The State of Alabama, } We, whose names are hereto
Lawrence county. } *assigned*, having been [appointed] by the probate court of Morgan county to divide, distribute and allot the estate of Joseph K. Blalock, late of said county, deceased, after having been duly sworn according to law, by virtue of said appointment, and in

pursuance of said order, make the following distribution—viz., lot No. 1 to Sarah Jones," (specifying the names and value of the slaves allotted to her;) "lot No. 2 to John C. Blalock," &c.; "lot No. 3 to Thomas J. Blalock," &c.; "lot No. 4 to Theophilus Jones," &c., "all of which is respectfully submitted."

At the bottom of this paper is a written agreement, signed by the four parties in interest, in these words: "We, the heirs and distributees of the estate of Joseph K. Blalock, deceased, accept and approve the distribution of said estate. Given under our hands," &c.

The chancellor sustained a demurrer to the bill for want of equity, and his decree is now assigned as error.

R. O. PICKETT, for appellant.

D. P. LEWIS, *contra.*

RICE, C. J.—It must be considered as settled in this State, that an administrator has the power to compromise actions pending in his favor for the choses in action belonging to the estate; the *bona fides* of his conduct in making such compromise being open to inquiry by the parties in interest. His power to compromise such action being established, his power to submit it to arbitration is undeniable.—Woolfork v. Sullivan, 23 Ala. R. 548; Jones v. Deyer, 16 Ala. R. 221.

The submission to arbitration and the award, as the same are set forth in the original bill in the present case, are valid as between the parties thereto. Their meaning is the matter of difficulty. The two writings, alleged to have been signed by the arbitrators at the same time, and in relation to the same subject-matter, and to be parts of an entire transaction, must, in determining the equity of the bill, be considered and construed as constituting the award. The written submission, with its subsequent verbal modification, must be looked to in construing the award; and the presumption must be indulged, as far as it can be consistently with the award, that the arbitrators,

in making it, intended, not to annul or violate any part of the submission, but to execute every part of it.

The award, as we understand it, provides distinctly for two things; 1st, that the administrator should have a judgment in the action of detinue, against the complainant, for the slaves sued for therein, (each of them being valued separately,) and for $1056 00 as damages for their detention, (or hire,) and three-fourths of the costs of that action; 2d, that the said slaves, at the valuation put upon them in that action, and the $1056 00 of damages, should be allotted into four distributive shares; that is, share No. 1 to complainant, share No. 2 to John C. Blalock, (who is a distributee, as well as the administrator,) share No. 3 to Thomas J. Blalock, and share No. 4 to Theophilus Jones.

But now comes the question, at what time, or upon what contingency, under the award, were the slaves and damages to lose entirely their character as assets of the estate of John C. Blalock's intestate, and to become the absolute property of the four persons respectively to whom the distributive shares were allotted as aforesaid? As to that question, the award itself is silent. But we think the answer to it is found in that part of the submission which is unaffected by the verbal modification, and which expressly declares, "that the distributive share of each *shall be liable to the demands of said administrator ratably for the expenses of said administration;* and that the records, inventories, decrees, and settlements of the courts, shall be in accordance with, and pursuant to said award." It strikes us, that the very object the arbitrators had in view, in providing in their award that the administrator should have a judgment in the detinue suit for the slaves and damages, was to fix upon them the character of *assets of the estate*, and to continue that character, as to each distributive share, until its ratable portion of the expenses of the administration of the estate was paid; and in that way to arm the administrator with the power of effectually enforcing by his judgment his demand upon the claimant of each share, of its ratable portion of said expenses. It certainly could not have been the intention of the arbitrators, to leave the administrator liable to pay out of his

own means the expenses of the administration of the estate, as those expenses should afterwards be developed or incurred, and to cut him off from any resort to the aforementioned distributive shares, except by a mere personal demand upon the distributees, to be followed up, if refused, by a new suit. We take it, that the arbitrators designed to put an end to litigation, not to increase it; to give fair protection to the administrator, not to put him at the mercy of the distributees. And our conclusion is, that under the submission and award, the distributive share of the slaves allotted to the complainant is not exempt from liability to the judgment and from its power, until she has made either an actual payment, or an actual tender, of all the sums of money which the award requires her to pay, including her ratable portion (that is, one-fourth) of *the expenses of the administration.* If such payment or tender has been made, then the judgment cannot be properly enforced further as against her or her distributive share, and her distributive share becomes her absolute property, as against the parties to this suit.

3. If such payment was made by her before the judgment was rendered, and she, without fault on her part, was prevented from availing herself of it in that suit, by the fraudulent conduct of the administrator in withholding from the circuit court that part of the award which allots the slaves and damages mentioned in the judgment into the four distributive shares, contrary to his agreement with the other parties; then, as she cannot, upon such a state of facts, by *supersedeas* or otherwise, obtain an entry of satisfaction or discharge *pro tanto* in a court of law, (Burt v. Hughes, 11 Ala. R. 571,) she may go into a court of chancery, to establish the part of the award so withheld by the administrator, and to enjoin any further proceeding under the judgment, against her or her distributive share. And so she may go into chancery for a like purpose, if, since the judgment, she has paid all of the sums of money required of her by the award, except her ratable portion of the expenses of the administration, and she is ready to pay that portion as soon as it can be ascertained,

and is rendered unable to pay it by reason of the fact that these expenses are not yet fully developed, or other like reason, and the administrator is attempting to enforce against her the judgment for expenses of the administration not fully developed or not paid by him. And, in short, the bill filed by her in the present case contains equity, because, upon the facts stated in it, she cannot, by any proceeding at law, obtain all that it was the object of the award to give her, and she is, therefore, entitled to resort to a court of equity for a specific performance of the award, and for the protection of that court until the award can be specifically performed.—Kirksey v. Fike, 27 Ala. R. 383; McNeill v. Magee, 5 Mason's Rep. 244; White & Tudor's Leading Cases in Equity, vol. 2, Pt. II, page 109.

Whether the facts stated in her bill be true or not, we do not now undertake to determine. As the chancellor sustained the demurrer to the bill for want of equity, we confine ourselves to the question whether the bill contains equity. In considering that question, we treat the allegations of the bill as true; and if they are true, the bill is not wanting in equity. How the case may turn out on a trial on the pleadings and proofs, is not a matter for our consideration at this time.

The chancellor erred in sustaining the demurrer, and dismissing the bill for want of equity. His decree is, therefore, reversed, and the cause remanded. The costs of this court must be paid by John C. Blalock, the administrator.

GARDNER *vs.* BOOTHE.

[DETINUE FOR SLAVES.]

1. *Estoppel against setting up outstanding title.*—In detinue by one claiming as trustee of a married woman, under a deed of gift from her husband, against a subsequent purchaser from the husband, the defendant is estopped from setting up an outstanding title in the wife.

2. *Validity of voluntary conveyance.*—A voluntary conveyance is not void, as against a subsequent purchaser for valuable consideration without notice, unless made with a fraudulent intent.
3. *Fraud question for jury.*—The question of fraudulent intent, in the execution of a voluntary deed, is for the determination of the jury; and the court has no right to assume that such intent is proved, even if there is a strong tendency of the evidence in that direction.
4. *Demand and damages.*—In detinue, the plaintiff is entitled to recover damages without proof of a demand, from the commencement of the defendant's unlawful possession; but where the defendant's possession is not clearly shown to have commenced at the time of his purchase, it is error in the court to instruct the jury that he is liable for damages from the time of his purchase.

APPEAL from the Circuit Court of Dallas.
Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by John Boothe, as trustee of Mrs. Eliza Bettner, against Mrs. Mary K. Gardner, to recover certain slaves, together with damages for their detention. The plaintiff's title was founded on a deed from Charles Bettner, the husband of Mrs. Mary Bettner, dated the 27th October, 1845, by which one of the slaves, Paralee by name, who subsequently gave birth to all the others in controversy, was conveyed to said Boothe, in trust for the sole and separate use of Mrs. Bettner; while the defendant claimed under a subsequent purchase from said Charles Bettner,—her bill of sale bearing date in December, 1848. It appeared from the evidence adduced on the trial, that the slave Paralee was bought by said Charles Bettner in Mississippi, where the parties then resided, from one Chandler, and was paid for with his own money; but that the bill of sale, dated February 15, 1848, was taken in the name of his wife, "for the purpose of preventing said slave from being made liable to the payment of his debts." Bettner and wife shortly afterwards removed to Mobile, where the deed to Boothe was executed, and thence to Dallas county; carrying the slaves with them at each removal. The deed to Boothe was recorded in Mobile, but not in Dallas county; and there was no evidence showing that defendant, at the time of her purchase, had any notice of said deed.

"To show the statute law of Mississippi, passed in 1839,

as to the rights of married women, and the construction of that law, (thereby waiving the production of the statute,) the defendant and plaintiff, by consent, introduced in evidence to the jury the following decisions of the supreme court of Mississippi," viz., Frost & Co. v. Doyle and Wife, 7 Sm. & Mar. 68; Davis and Wife v. Foy, 7 Sm. & Mar. 64; Hopkins v. Carey and Wife, 1 Cush. (Miss.) 54; Ratcliffe v. Dougherty, 2 Cush. (Miss.) 181.

This is, in substance, all the evidence adduced on the trial, as the same is set out in the bill of exceptions; and thereupon the court charged the jury, "that if the plaintiff was entitled to recover under the law and evidence, he was entitled to recover the hire of said slave Paralee, from the time she was bought by the defendant." The defendant excepted to this charge, and requested the court to instruct the jury as follows:

"1. That the plaintiff, if entitled to recover at all, could only recover hire from the time the suit was brought, or demand made.

"2. That the plaintiff was not entitled to recover under the evidence introduced in this case.

"3. That under the law and decisions aforesaid of the State of Mississippi, the legal title to said slave Paralee was vested in Mrs. Bettner; and that no title passed to plaintiff by the deed of Charles Bettner, which would entitle him to recover in this suit.

"4. That if the jury believed from the evidence that the defendant bought the slave Paralee from Charles Bettner, in good faith, without notice of the deed executed by said Bettner to plaintiff, and paid him a valuable consideration for said slave, they must find a verdict for the defendant."

The court refused each one of these charges, and the defendant excepted to each refusal; and she now assigns as error the charge given and the refusal of the several charges asked.

Wm. M. Byrd, and Geo. P. Blevins, for appellant.
Geo. W. Gayle, and N. R. H. Dawson, *contra.*

WALKER, J.—It is contended for the appellant, who

was the defendant below, that under the law of Mississippi, as set forth in the decisions which were read in evidence on the trial, that a complete title to the female slave who is the mother of all the others in controversy, vested in Mrs. Bettner; and that, consequently, Mrs. Bettner's husband had no title which he could convey by the deed of trust under which the plaintiff claims. The defendant thus, in effect, asserts the proposition, that there is outstanding in Mrs. Bettner, who is, as to this controversy, a third person, a title paramount to that transferred to the plaintiff by the husband of Mrs. Bettner. The defendant, however, claims title by a conveyance, in the form of a bill of sale, from the husband of Mrs. Bettner,—the same person from whom the plaintiff deduces his title. Thus claiming title from the same person with the plaintiff, and setting up no other title, the defendant is estopped from asserting a paramount outstanding title in a third person, with which he is not in any way connected. The plaintiff is not required to trace his title farther than to the source of title common to him and the defendant.—Gantt v. Cowan, 27 Ala. 582; Garrett v. Lyle, *ib.* 587; Seabury v. Stewart & Easton, 22 Ala. 207; Pollard v. Cocke, 19 Ala. 188; McCravey v. Remson, 19 Ala. 430; Miller v. Jones, 29 Ala. 174; S. C., 26 Ala. 247. It is, therefore, unnecessary for us to consider the effect of the Mississippi law; because, conceding to it the effect claimed by the appellant, it cannot avail her.

2. Although the deed of trust to the plaintiff was voluntary, it would not therefore be void as to the defendant, notwithstanding she may be a subsequent purchaser for valuable consideration without notice. To invalidate it as to a subsequent purchaser, it is necessary that there should have been a fraudulent intent.—Stiles & Co. v. Lightfoot, 26 Ala. 443.

3. A fraudulent intent being necessary to the avoidance of the plaintiff's deed, the court had no right to assume that such intent was proved, even though there had been a strong tendency of the evidence in that direction; consequently, the refusal of any charge which required such assumption, was not erroneous. If the defendant is a

subsequent purchaser for valuable consideration, she undoubtedly has the right to assail the conveyance to the plaintiff for fraud; and while the fact of its being voluntary would not, of itself, establish the fraud as against her, it would nevertheless be evidence to be regarded by the jury in determining the question of fraudulent intent. Read v. Livingston, 2 Johns. Ch.

4. If the plaintiff in this case had a right to recover at all, the defendant's possession was unlawful; and under the decision of Lawson v. Lay, 24 Ala. 184, a demand was not necessary to authorize the recovery of damages for the unlawful detention of the property. The charge of the court upon that subject would be perfectly consistent with the principle correctly established in the case cited, and would involve no error, if it had directed the jury to compute damages from the commencement of the defendant's possession. But the court fixed the time for the commencement of damages at the date of the defendant's purchase. The evidence conduces to show that the defendant's possession commenced at the time of her purchase, but does not establish that fact with such certainty as would justify the court in withdrawing the question from the jury. The court could not assume, in the state of the proof, that the slave passed under the defendant's control, and into her possession, at the time of her purchase. This charge of the court contains the only error found in the record; but, for the error on this point, the cause must be reversed, because, while it is *possible*, it is not *clear* that the defendant was not injured by the error.

The judgment is reversed, and the cause remanded.

HARRIS *vs.* DILLARD.

[PETITION FOR REMOVAL OF EXECUTOR.]

1. *Non-residence good cause of removal.*—Under the law existing in this State before the adoption of the Code, the removal of an executor or administrator from the State, without making a settlement of his accounts, was sufficient to authorize his removal from the trust; and his continued non-residence, since the Code became operative, is, under its provisions, (§ 1696,) good cause of removal, although he had left the State before the Code went into effect.
2. *Bill of exceptions necessary.*—An appeal under section 1888 of the Code is required (§ 1891) to be tried on bill of exceptions; and if the record contains no bill of exceptions, the appeal will be dismissed.

APPEAL from the Probate Court of Madison.

IN the matter of the estate of Edward Harris, deceased, on the application of Mrs. Elizabeth D. Dillard, one of the distributees and legatees, for the removal of the executor from his trust, on account of his having removed from the State more than ten years before the petition was filed, without making a settlement of his accounts, and his continued non-residence. The defendant demurred to the petition, but his demurrer was overruled; and he declining to say anything further in his defense, the court revoked his letters, and ordered his removal according to the prayer of the petition. These rulings of the court are now assigned as error.

WM. H. MOORE, and R. C. BRICKELL, for appellant.
ROBINSON & JONES, *contra.*

STONE, J.—We do not think the probate court of Madison erred in removing the executor in this case. The demurrer to the petition admitted the truth of its averments. One of those admitted averments was, that the executor, without making settlement, had removed from the State of Alabama, and was, at the time of the exhibi-

tion of the petition, and for ten years had been, a non-resident. Under the authority of Speight v. Knight, 11 Ala. 461, this uncontroverted fact authorized the probate court of Madison to remove him, independent of the authority conferred by section 1696 of the Code..

But we think the authority was also conferred by the Code, (§ 1696.) The spirit of that section is, that an executor or administrator, becoming non-resident, may be removed from the trust. It cannot be material that the act of removal shall have taken place after the Code went into effect. Non-residence is a fact continuous in its character. Each and every day after such non-residence commenced was but a renewal of the cause of removal; and we think, under all fair construction, the fact of non-residence gave the same right to remove him from the trust, as if the act of removal had taken place after the Code became operative.

There is also another reason why this appeal cannot be maintained. It was taken under section 1888, sub-division 3, of the Code. Section 1891 declares, that such appeal must be tried on a bill of exceptions. There is in this record no bill of exceptions; and, under the authority of Turner and Wife v. Dawson, at the present term, the appeal must be dismissed.

Judgment accordingly.

KEIFFER AND WIFE *vs.* BARNEY BROTHERS.

[BILL IN EQUITY TO SUBJECT SEPARATE ESTATE OF FEME COVERT TO PAYMENT OF CHARGE.]

1. *Decree pro confesso against non-resident.*—A decree *pro confesso*, against a non-resident, must state the facts necessary to show that publication has been made agreeably to the rules of practice, and cannot be entered until after the expiration of thirty days from the perfection of publication.
2. *Irregularity in decree pro confesso against husband available on error to wife.* Where husband and wife are properly joined as defendants to a bill, which

seeks to subject the wife's separate estate to the payment of a charge created by her during coverture, an irregularity in entering a decree *pro confesso* against the husband, on publication against him as a non-resident, is available to the wife on error.

3. *Weight of answer as evidence on hearing on bill and answer.*—Under the provisions of the Code, (§ 2302,) when an answer on oath is not waived, and the cause is heard on bill and answer only, the answer is taken to be true only so far as it is responsive to the bill.
4. *Who may claim the benefit of exemption law.*—A married woman residing in this State, who has no children, and whose husband is a non-resident, is not entitled to claim the benefit of the exemption law, (Code, § 2462,) because she has no family within the contemplation of the statute.

APPEAL from the Chancery Court of Lowndes.
Heard before the Hon. WADE KEYES.

THE bill in this case was filed by the appellees, against Mrs. Mary Keiffer and Louis Keiffer, her husband; and sought to subject Mrs. Keiffer's separate estate to the payment of a promissory note, executed by her and her husband jointly, during coverture, dated January 18, 1855. Publication was prayed against the husband as a non-resident; and a decree *pro confesso* was entered against him, which is particularly noticed in the opinion of the court. Mrs. Keiffer answered the bill, admitting the execution of the note as charged in the bill, and that she was possessed of a house and lot, in the town of Benton, which she claimed as her separate estate; but alleging, that her signature to said note was procured by false and fraudulent promises on the part of complainants, through their agent, to the effect that they would continue to furnish her husband, who was a blacksmith by trade, with iron for the use of his shop, which promises they failed to perform; also, that her house and lot did not include forty acres, and did not exceed $500 in value, and was claimed by her as exempt from levy and sale under legal process,—she being a resident of this State, and having a family here, though she had no children, and her husband was a non-resident; and she pleaded these facts in bar.

The cause was submitted for final hearing, on bill, decree *pro confesso* against Louis Keiffer, and answer of Mrs. Keiffer; and the chancellor rendered a decree in favor of the complainants.

The decree *pro confesso* against Louis Keiffer, and the final decree of the chancellor, are now assigned for error; while, on the part of the appellees, a motion is submitted to strike out the first assignment of error, on grounds stated in the opinion of the court.

J. F. CLEMENTS, for the appellants.

BAINE & NESMITH, *contra.*

WALKER, J.—The decree *pro confesso* against Louis Keiffer is defective in the following particulars: 1st. It merely states that publication had been made and perfected agreeably to the rules of practice in this court, without stating the facts necessary to constitute good service.—Hartley v. Bloodgood, 16 Ala. 233; Cullum v. Br. Bank, 23 *ib.* 797. 2d. The decree was taken before the expiration of thirty days from the perfection of the publication.—Code, § 2890.

2. It is insisted, that, although the decree *pro confesso* is erroneous, this court should not reverse upon this appeal, because the counsel for the appellant has admitted in writing that he has no authority to represent Louis Keiffer, as to whom there was a decree *pro confesso*, and that his entire authority is derived from Mrs. Keiffer; and it is contended, that this court, instead of reversing the case for the error in the decree *pro confesso*, ought to strike out the assignment of error raising that question. The husband was a necessary party in the assignment of errors here. It was proper that his name should be joined with that of his wife in the assignment of errors. An appeal to this court is in the nature of a new suit, and in it, as well as in other suits, not controlled by special circumstances, or by some special statute, the husband should be joined with the wife. One representing the wife is entitled to assign as error an irregularity in making the husband a party. In the absence of those circumstances which will authorize the wife to sue, and which will render her liable to be sued as a *feme sole*, the husband must be joined as a defendant with the wife, in suits brought by other persons against her.—1 Daniell's Ch. Pl. and Pr. 190. This rule is designed

for the protection of the wife, and she may avail herself of its violation in an appellate court. If the husband had not been named as a defendant in the bill, Mrs. Keiffer might have availed herself of the omission, by plea of coverture, or on demurrer.—Mowat v. Graham, 1 Edw. Ch. 575. When the wife may thus avail herself, by plea or demurrer, of the omission of the husband as a party, it cannot be said that she has no interest in his being properly brought before the court, or that she is not aggrieved by an irregularity in the mode of bringing him in. Peradventure, the husband would have answered, and she would have had his aid in the defense of the suit, if the court had not prematurely rendered the decree *pro confesso*.

3. There is no other error in the case, besides that already pointed out in the decree *pro confesso*. The hearing was had upon the decree *pro confesso*, and bill and answer of Mrs. Keiffer. The oath of the defendant to the answer was not waived. Under those circumstances, the answer of Mrs. Keiffer was evidence by the law deemed true, so far as it was responsive to the allegations of the bill. But, under the rule established by section 2902 of the Code, it was evidence only so far as it was responsive to the bill. The averments of the answer, as to the fraudulent procurement of Mrs. Keiffer's signature to the note, and of the facts supposed to make the property in question exempt from liability to her debts, are not responsive to the allegations of the bill, but are new matters brought forward in avoidance of the case made out by the bill. Therefore, under the Code, it was necessary that those defenses should be established by proof.

4. The question has been argued before us, whether, upon the facts alleged in Mrs. Keiffer's answer, the two lots in which she has a separate estate are exempted by the statute from liability to her debts. Those facts are, that the lots do not contain forty acres, and do not exceed in value five hundred dollars; that Mrs. Keiffer is a married woman, residing in the State of Alabama; that her husband resides in another State, and that she is without children. Waiving the consideration of the other arguments urged by the counsel of the appellees upon this

question, we decide it against the appellants, upon the ground that the existence of a family in this State, for whose use the law would reserve the property, is not shown. She has no child, and no husband, in this State. As far as the answer discloses, there is no person in the State of Alabama dependent upon her, or occupying such relation to her as to admit such person to a participation with her in the use of the property. It is thus clear that, if the property were reserved from sale, it would be for the use of Mrs. Keiffer, and not for the use of a family. It is the unmistakable object of the statute, to reserve property from liability to the payment of debts, for the use of families *in the State*, and not for the use of isolated individuals without any dependencies.—Code, §§ 2462, 2464; Allen v. Manasse & Mosely, 4 Ala. 554; Simonds v. Gulley, 7 Ala. 721.

We have decided this last question, because it is probable that, upon a future trial, the answer may be sustained, by proof of the facts out of which it arises; and the case would probably return upon us, if we should leave the question undecided.

The decree of the court below is reversed, and the cause remanded for further proceedings, as if no decree *pro confesso* had been rendered against Louis Keiffer. The appellees must pay the costs of the appeal.

STONE, J., not sitting.

HOLLEY *vs.* WILKINSON.

[CREDITOR'S BILL TO SET ASIDE FRAUDULENT CONVEYANCE BY DEBTOR.]

1. *Answer in chancery not outweighed by answer to garnishment at law.*—An answer to a garnishment at law is not sufficient to overcome the positive denials of the garnishee's answer in chancery, when responsive to the bill, which is filed by another person than the plaintiff in the action at law.

2. *Dismissal of bill without prejudice.*—In reversing the chancellor's decree, on account of the insufficiency of the proof to overcome the positive denials of the answer, the appellate court will dismiss the bill without prejudice, when the record shows that the plaintiff probably has a just cause of action.

APPEAL from the Chancery Court of Pike.
Heard before the Hon. WADE KEYES.

THE bill in this case was filed by Henry T. Wilkinson, a judgment creditor of Asa Alexander, seeking to subject to the satisfaction of his judgment certain real estate conveyed by said Alexander to Hosea Holley. The complainant's judgment against Alexander was rendered at the fall term, 1853, of the circuit court of Coffee county. Alexander's deed to Holley was executed on the 17th April, 1851; and the bill alleged, that said deed was either without consideration, and therefore fraudulent and void as to creditors, or was intended only as a mortgage. A decree *pro confesso* was entered against Alexander. Holley answered, alleging that his deed from Alexander was an absolute conveyance, accompanied by no parol trust or reservation whatever; and that its consideration was, an indebtedness from Alexander to him then existing, and his promise to pay other outstanding debts of Alexander's, which respondent had since paid in full according to his agreement. The only evidence adduced by the complainant to disprove this answer, consisted of Holley's answer to a garnishment at law, in several actions brought by Stapleton and others against said Alexander, in which the garnishee stated that he was not indebted to said Alexander, "unless the following facts will make him a debtor: Some time in the spring of the year 1851, he agreed to pay out certain money for said Alexander, and, in pursuance of said agreement, has paid out between $1,000 and $1,050; and that said Alexander, to secure garnishee, agreed to, and did, some time about the date of said agreement, deed certain lands and improvements, of the value of $3,000, to garnishee."

On final hearing, the chancellor rendered a decree for the complainant, ordering an account, a sale of the land, &c.; and his decree is now assigned as error.

Wm. P. & T. G. Chilton, for appellant
Hilliard & Thorington, and E. C. Bullock, *contra.*

RICE, C. J.—The positive denials of an answer responsive to the bill, and which meet the real object and effect of its charges, are not outweighed or disproved by the mere admissions of the respondent, contained in his answer to a garnishment, sued out against him at law by a person different from the complainant, unless the complainant waives the answer being made under oath, as he is allowed to do by section 2877 of the Code.—Love v. Braxton, 5 Call's Rep. 537; Hope v. Evans, 1 Smedes & Marsh. Ch. Rep. 195; Petty v. Taylor, 5 Dana, 598; Smith v. Rogers, 1 Stew. & Por. 317; Br. B'k at Decatur v. Marshall, 4 Ala. R. 60.

The answer to the garnishment at law, when offered in evidence in the suit in chancery, is regarded as a declaration or admission of the party making it; and when, as in this case, it is not corroborated by any other evidence, it will not overcome the positive denials of the answer to the bill. From these premises the conclusion is, that the decree was unauthorized by the proof, and must, therefore, be reversed. But, as the circumstances appearing in the record render it probable that the complainant has a just right, of which the chancellor would not have deprived him, by an absolute dismissal of his bill, if he had taken the same view of the evidence which we have taken, we shall not deprive the complainant of the opportunity to assert whatever right he may have in another suit, but shall dismiss his bill without prejudice to his right to file another bill asserting his right to relief.—Wilkins v. Wilkins, 4 Porter, 245; Singleton v. Gayle, *ib.* 270.

The decree of the chancellor is reversed, and a decree must be here rendered, dismissing the bill without prejudice, as herein above stated; and adjudging the costs of this court, and of the court below, against the complainant.

WITTICK'S ADM'R *vs.* KEIFFER AND WIFE.

[DETINUE FOR SLAVES.]

1. *Admissibility of declarations in rebuttal of implied admission.*—Plaintiff having proved that the slaves in controversy were appraised as a part of his intestate's estate, in defendant's presence, and that defendant then asserted no title to them, it is competent for defendant to rebut this evidence, by proof of her private assertions of title to one of the appraisers, before the completion of the appraisement.
2. *Weight of verbal admissions as evidence.*—Although a verbal admission, deliberately made, may afford proof of the most satisfactory character; yet it is erroneous to instruct the jury, that it is "the best kind of evidence."
3. *Judgment for defendant in detinue.*—In detinue, if the property has gone into the possession of the plaintiff on his execution of the statutory bond, and the verdict of the jury is in favor of the defendant, the judgment should be for the property itself or its alternate value; and a judgment for the specific property alone will be reversed on error at the instance of the plaintiff.

APPEAL from the Circuit Court of Lowndes.
Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Henry Traun, as the administrator of Frederick Wittick, deceased, against Louis Keiffer and Mary, his wife, to recover a slave named Betsey, with two of her children, together with damages for their detention. It is the action referred to in the previous case between the same parties, as reported on page 136. The defendants having failed, for five days, to execute the statutory bond, and the plaintiff having given bond according to the requisitions of the statute, the slaves were delivered into his possession. The only plea, on which issue was joined, was *non detinet.*

The defendants claimed the slaves under a parol gift to Mrs. Keiffer, then Mrs. Wittick, from the plaintiff's intestate, who was the uncle of her deceased husband, and who had induced her and her husband to emigrate from Germany; and sought to establish the gift by proof of the circumstances under which it was made, and the donor's subsequent admissions. In reference to these

admissions of the plaintiff's intestate, the court charged the jury, "that if these declarations were loosely made, they were the weakest kind of evidence; but, if they were deliberately made, they were the best kind of evidence"; to which charge the plaintiff excepted.

The plaintiff proved, that the slaves were appraised as a part of the estate of his intestate, and were returned as such in his inventory; that Mrs. Keiffer was present at the appraisement, and claimed several articles of household furniture, but asserted no claim to said slaves, and did not object to their appraisement. In rebuttal of this evidence, the defendants proved by one Hardy, who was one of the appraisers, "that after the appraisement was over, and when the appraisers had retired to a room to write out their appraisement, the defendant Mary called out said Hardy privately, and told him that she did not know the appraisement was to be made until it was begun, that she claimed Betsey and her children, and that said Frederick had given them to her in his lifetime; and the witness further stated, that he never repeated this conversation to either the plaintiff or the other appraisers." The plaintiff objected to each portion of this evidence, and reserved an exception to the overruling of his objections.

The jury returned a verdict for the defendants, but did not assess the value of the slaves; and the court thereupon rendered judgment in their favor, against the plaintiff, for the negroes sued for, with costs.

The errors now assigned are, 1st, the admission of Hardy's testimony as to Mrs. Keiffer's assertion of title; 2d, the charge of the court as to the effect of the intestate's admissions; and, 3d, the rendition of judgment on on the verdict.

Baine & NeSmith, for appellant.
Geo. W. Gayle, *contra.*

WALKER, J.—The question as to the admissibility of Mrs. Keiffer's declaration to the witness Hardy, at the time of the appraisement of the property of plaintiff's

intestate, is identical with a question in the case decided at this term between the same parties. We decide the question, upon the authority of that decision, against the appellant.

2. In the case of Garrett v. Garrett, 29 Ala. 439, we adopted the following as a correct statement of the value of verbal admissions as evidence: "When a verbal admission is deliberately made, and precisely identified, the evidence it affords is often of the most satisfactory nature; nevertheless, proof of mere verbal admissions of a party, unsustained by any other circumstances, should always be cautiously weighed, because of their liability to be misunderstood, the facility of fabricating them, and the difficulty of disproving them." The court instructed the jury, that if certain declarations of the plaintiff's intestate were loosely made, they were the lightest kind of evidence; but, if deliberately made, they were *the best kind of evidence.* From the words of this charge, the jury would understand the court, not to exclude them from carefully scrutinizing the credibility of the witnesses who proved the declarations, and the reliability of their memories; and, in that particular, we do not deem it erroneous. But, when the court says, that declarations, deliberately made, are the "*best kind*" of evidence, it is tantamount to saying that they are better than any other kind of evidence. While declarations, deliberately made, may afford proof of the most satisfactory character; yet they are not better than every other kind evidence. The court erred in assigning to them a pre-eminence as evidence, which does not belong to them; and we cannot hold that the plaintiff was not prejudiced by this error, especially as there was not complete harmony between all the other evidence in the case and those declarations.

3. The plaintiff, having gone into the possession of the slaves sued for upon the execution of the statutory bond, was liable to a judgment for the property, or its alternate value, in favor of the defendant who was the successful party. Section 2194 of the Code authorizes such a judgment.—See Rowan v. Hutchisson, 27 Ala. 328. But the

plaintiff has the same right to relieve himself by the payment of the alternative judgment for the value of the property, which appertains to an unsuccessful defendant; and it was, therefore, clearly improper to render a judgment for the specific property alone. The judgment should have been in the alternative. This error is prejudicial to the plaintiff, because it deprives him of a right. See Pharr v. Bell, 7 Ala. 807; Code, §§ 2194, 2195, 2196.

The judgment of the circuit court is reversed, and the cause remanded.

TURNER AND WIFE *vs.* KEY'S ADM'R.

[FINAL SETTLEMENT AND DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *Bill of exceptions necessary.*—An appeal from the decree of the probate court, rendered on the final settlement and distribution of a decedent's estate, is required (Code, § 1891) to be tried on bill of exceptions; and where the record contains no bill of exceptions, the appeal will be dismissed.

APPEAL from the Probate Court of Russell.

IN the matter of the final settlement and distribution of the estate of Madison T. Key, deceased. The errors assigned question the correctness of the rulings of the probate court in refusing to allow to the decedent's widow, now the wife of George W. Turner, a distributive share of said estate, on the ground that she had a separate estate.

A. EILAND, and JAS. E. BELSER, for the appellant.

BENJ. H. BAKER, *contra.*

RICE, C. J.—The constitution of this State (Art. V. § 2) declares, that this court shall have appellate jurisdiction, "under such restrictions and regulations, not repugnant to this constitution, as may, from time to time, be prescribed by law." The appeal in this case was taken

under section 1888 of the Code. It is one of the appeals which, according to section 1891 of the Code, "must be tried" in the appellate court on a bill of exceptions. The plain meaning of the section last cited is, that where there is no bill of exceptions, an appeal like this cannot be tried by the appellate court. To that restriction, or regulation, we are bound to conform; and as there is no bill of exceptions in this case, the appeal must be dismissed, at the costs of appellants.

WITTICK *vs.* TRAUN.

[CONTEST AS TO VALIDITY OF WILL.]

1. *Declarations of administrator, executor and legatee not admissible to establish will.* Where an administrator is cited to produce a paper in his possession, which is alleged to be the will of the decedent; which paper, when produced, is propounded for probate by one of the legatees therein named, at whose instance the citation was issued, and contested by the administrator, who is named executor and made the principal legatee,—the declarations of the administrator cannot be received to establish the validity of the will.

APPEAL from the Probate Court of Dallas.

AT the instance of the appellant, Rachel Wittick, who is an emancipated negro, a citation was issued to Henry Traun, who had been previously appointed by said probate court administrator of Frederick Wittick, deceased, requiring him to produce the will of said decedent, which was alleged to be in his possession. In answer to the citation, Traun produced a paper, which purported to be the last will and testament of said Frederick Wittick, but was without signature, and not attested by any subscribing witnesses; and by which two slaves, an eighty-acre tract of land, and some personal property, were bequeathed to said Rachel Wittick, and all the residue of the testator's estate, real and personal, to Philip Henry

Traun, his nephew, who was also appointed executor. This will being propounded for probate by Rachel Wittick, and contested by said Henry Traun, an issue was thereupon made up between them, which was submitted to the decision of the court without the intervention of a jury; and, as appears from the final decree of the court, publication was duly ordered and made against the heirs and next of kin of the decedent, whose names are nowhere stated. On the trial of the issue, as the bill of exceptions states, "the plaintiff offered to prove the declarations of the defendant to one Hardy, shortly after the death of said Wittick, to the effect that he was present at the execution of said will, and saw it signed by the testator and subscribing witnesses; that the will propounded for probate, when first found by him among the papers of said Frederick Wittick, was all right; that he folded it up, and placed it in the middle of a bundle of papers belonging to said Frederick Wittick, and placed the same in a sideboard of which one Mary Wittick had the key; that on a subsequent examination of said bundle of papers, said will was found removed from the place in the bundle in which he had placed it, and was on the top of the bundle; that the names of the testator and subscribing witnesses had been cut away; and that defendant asked witness, to whom he then showed the will, if he did not think said names had been cut off with scissors." The exclusion of this evidence, to which the proponent excepted, is the only matter assigned as error.

Geo. W. Gayle, for the appellant.—The declarations of Henry Traun, who was the executor, the principal legatee, and a party defendant to the proceeding, were competent evidence against him. He and the proponent being the only legatees, no one else could be affected by the evidence; and he being the only heir-at-law, and therefore interested to defeat the probate, his declarations were against his interest.—Roberts v. Trawick, 13 Ala. 68, 79; Hill v. Buckminster, 5 Pick. 391; Atkins v. Sanger, 1 Pick. 192; Emerson v. Thompson, 16 Mass. 429; Fenwick v. Thorton, M. & M. (Eng.) 51.

WM. M. BYRD, *contra*, cited Bunyard and Wife v. McElroy, 21 Ala. 311; Roberts v. Trawick, 13 Ala. 68; Chisolm v. Newton, 1 Ala. 371; Brown v. Foster, 4 Ala. 282; 2 Ala. 388.

WALKER, J.—It is clear upon reason and authority, that the declarations of Henry Traun are not made admissible evidence to establish the will by the fact that he was the administrator. It is not shown that *Henry Traun*, the appellee and administrator of the estate, whose declarations were offered in evidence, was the same person with *Philip Henry Traun*, to whom the greater portion of the estate is bequeathed by the alleged will, and who is therein appointed executor. But, conceding that the two names designate the same person, still the admissibility of the testimony doesnot follow. The declarations of an executor are not admissible for the purpose of impeaching a will; still less would they be admissible for the purpose of establishing it. But, upon the concession made for the sake of the argument, Henry Traun is not only administrator, and appointed executor, but he is the legatee and devisee of the greater part of the estate. This last fact makes his declarations clearly inadmissible for the purpose of establishing the will. It is a plain case of the largest beneficiary under a will making evidence by his declarations to establish the will.

It does not appear from the bill of exceptions, that Henry Traun, in the absence of the will, would take any part of the estate, as the heir or distributee of the decedent; nor are any facts alleged, from which we can ascertain that he would be either the heir or distributee. The fact stated in the putative will, that Philip Henry Traun is the nephew of the decedent, does not show that he is the heir or distributee. He may have been the nephew, and yet there may have been other persons who, under our statute of descent and distribution, would take before him.

The authorities in reference to the different legal propositions asserted in this opinion are cited upon the briefs.

The decree of the court below is affirmed.

STONE, J., not sitting.

DURDEN *vs.* McWILLIAMS.

[TRIAL OF RIGHT OF PROPERTY IN SLAVE.]

1. *Statute of frauds as to three years possession of personalty.*—Three years possession of personal property, under a loan, does not render such property liable to the debts of the bailee contracted before the expiration of the three years.

APPEAL from the Circuit Court of Autauga.
Tried before the Hon. ROBERT DOUGHERTY.

THIS suit was a trial of the right of property in a slave, between A. K. McWilliams, plaintiff in execution against W. L. Durden, and Mrs. Gilly Durden, who was the mother of said defendant in execution, as claimant. The plaintiff's judgments were rendered on the 14th April, 1854, and were founded on several promissory notes executed by said W. L. Durden, dated December 27, 1850, Jan. 21, 1852, Feb. 17, 1853, and Feb. 27, 1854. It appeared that the claimant, about Christmas, 1849, divided out her slaves among her children; but her son W. L. Durden being wild and dissipated, "she would not part with the title to the slaves set apart to him, among whom was the slave in controversy, but said she would let him have their use and labor so long as she saw fit, and reserve to herself the privilege of repossessing herself of them when she pleased." At the time of the levy, August 2, 1854, the slave was in the claimant's possession. The court charged the jury, "that if the defendant in execution had been for three years in uninterrupted possession of the slave, without demand made and pursued by due course of law by the claimant, and without there having been any written agreement, testifying as to the character of his possession, duly recorded; and plaintiff had acquired a lien on the slave during that time,—then the slave would be subject to plaintiff's lien." This charge, to which the

claimant excepted, is the principal matter now assigned as error.

ELMORE & YANCEY, for the appellant.
WATTS, JUDGE & JACKSON, *contra.*

WALKER, J.—The decision of the majority of this court, in the case of Carew v. Love's Adm'r, at the present term, holds, that three years possession, under a loan, does not render the chattels so possessed liable to the debts of the bailee, created before the expiration of the three years possession. This decision is decisive of the question arising upon the charge given by the court. The charge was erroneous, because it authorized the subjection of the slave to the payment of the bailee's debts created before the expiration of the three years possession, upon the mere ground of that possession.

The questions of evidence, presented in the bill of exceptions, will probably not again arise; and we therefore do not deem it necessary to decide them.

The judgment is reversed, and the cause remanded.

STEWART'S ADM'R *vs.* STEWART'S HEIRS.

[BILL IN EQUITY FOR SETTLEMENT OF ADMINISTRATION.]

1. *Jurisdiction of equity to settle administration.*—The settlement of a decedent's estate, which has been commenced in the probate court, may be removed into chancery by the administrator, whenever the powers of the former court are inadequate to do complete justice between the parties; as where the distributees seek to charge the administrator with the payment of money, against which he has a complete equitable defense not available before the probate court.
2. *Equitable sanction of unauthorized act.*—Where a decedent had contracted in his lifetime for an exchange of lands, but died before titles were made, though each party had entered into possession under the contract; and his administrator, by agreement with the other party to the contract, procured

an order of sale, and sold the tract belonging to the decedent, which was bought in by the other party, who then conveyed his tract to the decedent's heirs-at-law; and it appeared that the exchange was beneficial to the estate. —*held*, that a court of equity would sanction the transaction, and would not allow the distributees to charge the administrator with the nominal price for which the land sold.

3. *Extent of relief in equity.*—On bill filed by an administrator for a settlement of his trust, a single ground for equitable interposition being shown, the court will go on and close the entire administration.
4. *Equitable relief on ground of mistake.*—An administrator, having kept an estate together for several years, under the erroneous supposition and belief that he was acting under an order of court, cannot obtain relief in equity, on the ground of mistake, when it appears that no record evidence of such order ever existed, and that the probate judge never made any such order, because he considered the statute, of itself, a sufficient authority for keeping the estate together.
5. *Election by distributees as to ratification of unauthorized act of administrator.*—An estate having been kept together for several years by an administrator, under the erroneous supposition that he was acting under an order of court, the distributees may, at their election, either ratify his unauthorized acts, or hold him to a strict statutory accountability; but their election must be entire, and must be announced before entering on the account.
6. *Husband's right to wife's choses in action.*—If the husband does not reduce to possession, during coverture, his wife's distributive share of an unsettled estate in the hands of an administrator, the administrator cannot, after the death of the wife, hold her distributive share as an equitable set-off against a debt due to him from the husband.
7. *Liability of administrator.*—An administrator is chargeable, on settlement of his accounts, with the amount of a note taken by him for the price of property sold belonging to the estate, although he shows that the claim "proved insolvent;" but, where it is shown that a note, given for the price of a negro sold by him, was successfully defended as to a part of the demand, and that the loss is not attributable to the fault or laches of the administrator, he is only chargeable with the amount actually collected on it.
8. *Compensation of administrator.*—An administrator is entitled to compensation, on settlement of his accounts, except in cases of gross negligence or willful default.

APPEAL from the Chancery Court of Lawrence.
Heard before the Hon. JOHN FOSTER.

THIS bill was filed by Franklin C. Owen, against the heirs-at-law and distributees of John Stewart, deceased, for a settlement of his administration on the estate of said Stewart, which was pending in the probate court of Lawrence. It alleged, that said Stewart died, intestate, in 1834, leaving a considerable estate, but much involved in debt; that letters of administration on his estate were

afterwards, in 1834, granted to complainant by said probate court; that in 1835, soon after the passage of the statute authorizing the estates of decedents to be kept together, he applied to said court, at the request of the widow and family of the intestate, for an order authorizing the estate to be kept together for three years. The original bill alleged that, on an examination of the records of the probate court, the order allowing the estate to be kept together could not be found; while the amended bill averred that, since filing the original bill, complainant had been informed, and so stated the fact to be, that it was the practice of said orphans' court, under said act of 1835, not to make an entry of record of the authority granted for keeping an estate together.

The bill further alleged, that complainant, acting under the belief that he had authority under an order of court, kept the estate together, worked the plantation, paid all the expenses, and supported the widow and children out of the proceeds; that at the close of the year 1837, after the estate had been thus managed for three years, it was thought advisable to break up the plantation; that the lands and personal property were accordingly sold, under orders of court, at different times; that the moneys received from the estate, and from the sales of property, were applied in payment of the debts of the estate, and afterwards in distribution among those entitled to it; that the complainant's administration has proved highly beneficial to the interests of the estate, which would have proved almost insolvent if it had not been thus managed and kept together; that the sales of land were approved by the court, and titles were made to the purchasers; that partial settlements were made with said orphans' court, in 1836, 1838, 1839, and 1841; that the estate was much involved in litigation for many years, which being ended in 1850, complainant made application for a final settlement of his administration; that objections to his accounts were interposed by two of the female distributees, who had intermarried with Henry C. Ledbetter and James W. Ledbetter.

The bill further alleged, that the intestate, some short

time before his death, had made a verbal agreement with one Gibson for an exchange of lands; that no titles had been made by either party at the time of the intestate's death, but each had put the other in possession under the contract; that for the purpose of perfecting the titles to these lands, complainant made application to said orphans' court for an order of sale, under which he sold the tract belonging to the decedent's estate; that Gibson became the purchaser, at the nominal price of $400, and then conveyed his tract to the decedent's heirs-at-law; that this arrangement was made under legal advice, and that the exchange was beneficial to the estate.

It was further alleged, that at a sale of the personal property of the estate, made prior to the order for keeping the estate together, the intestate's widow became a purchaser of some articles, for which she executed her note; that when it was afterwards determined to keep the estate together, these articles were found to be necessary for the use of the plantation; that complainant accordingly purchased them from the widow, at the price which she had given for them, and surrendered her note to her; that the articles were used on the plantation, and were afterward sold as the property of the estate; that the transaction was known to the distributees, none of whom expressed any disapproval of it, and was afterwards confirmed by said probate court in one of the partial settlements. Also, that one William B. Jenkins, who had intermarried with one of the female distributees, and whose wife died after the filing of the original bill, purchased some of the property at a subsequent sale, and executed his note, with security, for the purchase-money; that the note was afterwards reduced to judgment, but the parties "proved insolvent," and nothing was collected on it; and that said Jenkins is entitled to the distributive share of his deceased wife. Also, that one Pleasant Craddock became the purchaser of a slave at one of the administrator's sales, and executed his note, with security, for the purchase-money; that suit was instituted on this note, and a judgment rendered for the administrator, but for less than the amount of the note,—

"said Craddock being released from the balance by said judgment on account of the unsoundness of the said slave."

The bill prayed an account and settlement of the entire administration, and added the general prayer for other and further relief.

On final hearing, on pleadings and proof, the chancellor dismissed the bill for want of equity; and his decree is now assigned as error.

E. W. Peck, and R. O. Pickett, for the appellant. 1. Although the settlement of an administration has been commenced in the probate court, it may be withdrawn from that court, and taken into the chancery court, whenever the powers of the former court are inadequate to the exigencies of the case.—Pharis v. Leachman, 20 Ala. 662; Dement v. Boggess, 13 Ala. 143; Horton v. Mosely, 17 Ala. 794; Blakey v. Blakey, 9 Ala. 391.

2. The complication of the accounts is sufficient to authorize a resort to chancery.—Gould v. Hays, 19 Ala. 438; 15 Ala. 246; 8 Porter, 397; 5 Stew. & P. 133.

3. The mistake under which the administrator acted, in keeping the estate together, is a good ground for equitable relief.—1 Story's Equity, § 140; Benford v. Daniels, 13 Ala. 667.

4. The jurisdiction of equity having attached for one purpose, that court will go on and close the administration.—Blakey v. Blakey, 9 Ala. 391; 8 Porter, 399.

5. On taking the account, the distributees cannot hold the administrator to a strict settlement under the statute, and yet claim the benefit of all his acts in the management of the estate; but they will be required to elect on which principle the account shall be stated.—McCreliss' Distributees v. Hinkle, 17 Ala. 459.

David P. Lewis, *contra*.—1. The principal object of the bill is, to supply records of the probate court which were never in existence, and then to impart to them a force and conclusiveness which, had they existed in the most

regular and authentic form, they would not have possessed. Steele v. Knox, 10 Ala. 608. Chancery has no jurisdiction of such a case. The only remedy is by motion to amend, *nunc pro nunc*, in the probate court.

2. The exchange of lands with Gibson furnishes no ground for the interposition of equity. The bill does not allege that the appellees seek to charge the administrator, with the proceeds of the exchanged lands; and if this was shown, the probate court is as competent to adjust the question of assets on this voucher as on any other in the account. The bill shows an executed contract, in which the parties have acquiesced for upwards of twenty years, and does not allege any symptom of dissatisfaction on the part of the distributees. If the distributees should attempt to disturb Gibson's vendees, their defense is an enterprise with which the administrator has no concern. If they seek to charge him with the proceeds of the lands sold by him, he is estopped, both at law and in equity, from setting up the matters alleged in the bill touching that transaction.

STONE, J.—We think the chancellor erred, in dismissing this bill for the want of equity. During the lifetime of Mr. Stewart, he had agreed with Mr. Gibson for an exchange of eighty acres of land; and pursuant to that agreement, each party had taken possession of the land thus obtained from the other. No title had been made by either; and hence, to perfect the exchange, a resort to some legal proceedings became necessary. The plan adopted in this case was an application by Mr. Owen, the administrator, to the orphans' court for leave to sell the land which had fallen to Gibson in the exchange. The order was granted, the land sold, and Gibson became the purchaser. A title was afterwards made to Gibson; and he thereupon executed a conveyance to the heirs of Stewart of the eighty acres which fell to the latter in the exchange. The four hundred dollars purchase-money, the price at which Gibson had bid off his eighty acre tract, was not paid by him. In fact, this entire arrangement seems to have been entered into as a cheap and simple

method of quieting and perfecting the titles. The record tends strongly to show that, in the petition and order of sale, there is a misdescription of the numbers of the land which fell to Gibson. The proof is full and satisfactory, that the alleged exchange of lands was in fact made by Stewart and Gibson; and the proof is equally satisfactory, that the exchange was highly beneficial to Stewart and his heirs. The estate has had the benefit of the eighty acres obtained from Gibson; and we have no hesitation in holding, that the distributees of Stewart have no right to charge the administrator with the four hundred dollars, or any part of it, for which Gibson bid off his land.

Waiving the consideration of the question, whether an administrator can himself transfer the settlement of his administration to the court of chancery, a clear reason exists in this case for sustaining this bill.—See Mallett v. Dexter, 1 Curtis, 178; Horton v. Mosely, 17 Ala. 794; 1 Story's Equity, § 544; Dement v. Boggess, 13 Ala. 140; Leavins v. Butler, 8 Porter, 380; Harrison v. Harrison, 9 Ala. 470; King v. Smith, 15 Ala. 264. In this case, the peculiar ground for equitable interposition is the matter of the exchange of lands above mentioned. The Ledbetters, by their answer, do not admit the administrator's right to perfect the exchange; but their answer tends strongly to show, that they are willing to charge him with the $400 purchase-money *nominally* promised by Gibson, and any other liability which, under strict rules of law, they can fasten upon him. In this contest, the court of probate is wholly inadequate to render complete justice; and this gives the court of chancery jurisdiction, on the principle, that the court of chancery will legalize and sanction what the court itself would, on a proper application, have ordered to be done.—Elliott v. Horn, 10 Ala. 348; Wilson v. Sheppard, 28 Ala. 629.

This feature of the case gives the chancery court jurisdiction, according to the principles settled in Horton v. Mosely, 17 Ala. 794; and having jurisdiction for one purpose, this will draw to it the right to adjust the entire administration.—King v. Calhoun, 5 Ala. 523.

The bill alleges, that Judge Wallace, then the judge of

the orphans' court of Lawrence county, made an order to keep the estate together under the act of 1835; but that conceiving it to be unnecessary to enter said order on the records of his court, he made no entry or record thereof. The answer puts this averment in issue. The proof does not sustain this averment of the bill; but tends strongly to prove, that the construction placed on this statute by Judge Wallace was, that the act itself gave the authority to keep the estate together, without any order of the court to that effect. In this he evidently misapprehended the law.—See Clay's Digest, p. 198, § 30. But, if the averment of the bill was proved, it would be wholly insufficient. The judgments of courts of record can only exist in the records of the court. They can not exist in parol, or be proved by oral evidence. Oral evidence is even wholly inadmissible, on an application to enter a judgment *nunc pro tunc*.—Hall v. Hudson, 20 Ala. 284; Hudson v. Hudson, *ib.* 364; Perkins v. Perkins, 27 Ala. 479.

Under this view of the authorities, we feel it our duty to declare, that this administration must be settled, as if no order to keep the estate together had ever been asked for, or pretended to have been granted. It results, that the administrator was clothed with only the general powers of administrators, which, under our statutes existing when Owen was appointed, were, to collect together the assets, obtain an order, and under it sell the goods that were strictly perishable; pay the debts; and, if his intestate was engaged in planting, and died "after the first day of January," to continue the servants or slaves of which he was possessed, and which were engaged in making a crop, on the plantation in the occupation of decedent at the time of his death, until the last day of December following.—Clay's Digest, 196, § 19. Further, if necessary, to obtain an order for the sale of so much of the personal estate as might be necessary for the payment of the debts; after exhausting the personal estate, to obtain an order and sell the real estate, if needed to pay debts; or to sell land in preference to slaves, if it be made to appear that the estate of the decedent, or those entitled to inherit the same, would be less injured thereby.—Clay's Digest, 223,

§ 13; *ib.* 195, § 18; *ib.* 224, §§ 16, 17, 18, *et seq.* After eighteen months, the distributees had the right to call for distribution, unless some special reason existed for greater delay.—Digest, 196–7, §§ 23, 24; 2 Williams on Ex'rs, 640–9; 2 Kent's Com. 415–20.

We believe we have given an outline of the general duties of administrators, as they existed in 1834. They had no authority to keep up the planting interest, longer than the close of the year during which decedent died. The act of 1835 only gave them such authority, when they obtained an order therefor. That was not done in this case; and hence the continuance of the planting interest, after the year 1834, was unauthorized and illegal.

Arriving at these conclusions, it follows necessarily, that the distributees are clothed with the option of ratifying the unauthorized act of the administrator. Should they do so, they will be entitled to distribution out of the proceeds of the plantation, after deducting for all reasonable expenses and charges. Or, they may elect to hold the administrator accountable for the rent of the land, the hire of the slaves, and other property employed by him in planting, after the year 1834, up to the time of the sale. This election they must announce before entering upon the accounts; and if they, or any number of them, elect to proceed for rent of the land and hire of the slaves, they will not be entitled to any of the proceeds of the plantation after the first year. The election must be entire and indivisible. In other words, neither of the distributees will be permitted to claim any interest in the proceeds of the plantation for the years 1835–6–7, and hire or rent for any part of said time. No one distributee will be permitted both to ratify and renounce the continuance of the plantation.

While we feel it our duty to declare the law as above stated, the record abundantly shows that Owen acted under the honest conviction that he was authorized to keep the estate together under the act of 1835; that he managed the estate prudently and successfully; and that the consequence of his management has been to pay the estate out of its embarrassments, to support and rear the

family, and to save for them a considerable patrimony; whereas, if he had pursued the ordinary course, we think there would have been little or nothing left for the support of the family, or for distribution. Under these circumstances, we have to regret the necessity, which the law casts on us, of enforcing a rule which we think cupidity is mainly instrumental in invoking.

If the distributees so elect, the administrator must be held to the first sale made of the perishable and personal property, and will not be allowed to charge the estate for the re-purchase he made from Mrs. Stewart. That was made, as we have seen, without authority; and the distributees are not bound to ratify or accept it. If the administrator be held to the first sale, he must not be charged for the subsequent use of that property, or with its proceeds on the second sale. Neither will he, in that event, be chargeable with the proceeds of any property which he received in exchange for the property bought back by him from Mrs. Stewart.

We know of no principle of law, which will authorize the administrator to set off the debt due from Wm. B. Jenkins and others, against the distributive interest due to the estate of Mrs. Maria Jenkins, his late wife. That distributive interest, so far as the same remains unpaid, is but a chose in action; and Jenkins, not having reduced it to possession during the continuance of the coverture, can not assert his marital rights over it after the termination of the coverture by the death of Mrs. Jenkins.—Montgomery v. Givhan, 24 Ala. 568; Bibb v. McKinley, 9 Por. 636; Andrews v. Jones, 10 Ala. 442.

Under the pleadings in this case, we do not think the complainant places himself in a condition to dispute his liability for the Jenkins debt. That debt was created in the purchase of property from the administrator; and he, the administrator, took the note. *Prima facie*, he is chargeable with the amount of the sale-bill, and he has given no reason why he should not be charged with this item. The averment is, that this claim "proved insolvent." It is not averred that the makers of this note were either solvent, or reputed to be solvent, at the time the note was executed.

The administrator must be charged with this item. But the debt of Pleasant Craddock stands on a different principle. If that suit was successfully defended, as to a part of the demand; and the loss is not imputable to the fault or *laches* of the administrator, it should not be charged against him. This question is referred to the registrar.

The rule in regard to commissions, as settled by repeated decisions of this court, is to allow them, "except in cases of gross negligence, or willful default."—Gould v. Hays, 19 Ala. 438; Carroll v. Moore, 7 Ala. 617; Phillips v. Thompson, 9 Por. 667; Powell v. Powell, 10 Ala. 914; Emanuel v. Draughan, 14 Ala. 302. Under this rule, the administrator is clearly entitled to commissions in this case, to the extent after stated.

The decree of the chancellor is reversed; and this court, proceeding to render such decree as should have been rendered in the court below, doth hereby order, adjudge, and decree, that the said administration be settled in the chancery court of Lawrence, according to the principles of this opinion. In taking the account, the registrar will state the account first between the administrator and the estate. He will charge the administrator with all the assets that have come to his hands, according to the principles of this opinion, and he will credit him with all the debts of the estate of the said Stewart, which have been paid by him. He will also credit him with the expenses of the plantation for the year 1834, and allow him reasonable compensation for any special and extra attention he may have bestowed in and about the plantation during the year 1834.—See Pinckard v. Pinckard, 24 Ala. 250. So, if the distributees elect to ratify the unauthorized continuance of the plantation, and take the proceeds of the crops, the administrator will likewise be entitled to like compensation for his reasonable care and expenses in keeping up the plantation afterwards. If, however, they elect to hold him accountable for the rent of the land, and the hire of the negroes and other property, then the administrator will be entitled to no commissions on those items for the years 1835, 1836, and 1837.

The administrator must be allowed 5 per cent. com-

missions on all the money assets of the estate which he reduced to possession, except for the rent of land and hire of negroes for the years 1835–6–7, if the distributees elect to charge him for them. He is also entitled to a credit of $2\frac{1}{2}$ per cent. commissions on all sums of money paid out by him in extinguishment of the debts of the intestate, and the expenses of the plantation during the year 1834. He is also entitled to a reasonable allowance, to be fixed by the registrar on proof, for any special services he may have rendered, and expenses he may have incurred, in the prosecution or defense of litigation in which the estate was involved, unless such litigation was brought about by the fault or the laches of the administrator.—Bendall v. Bendall, 24 Ala. 295. The registrar will also make him any other proper allowances to which he may be entitled.

After adjusting the general administration and its accounts, the registrar will proceed to state an account against each distributee who comes in and claims distribution. He will charge each with all reasonable expenses, board, clothing, education, and all other payments and expenses incurred for the benefit of such distributee; the same to be settled after hearing such proofs as may be offered on these points. The registrar will also allow him five per cent. commissions on all sums of money which he expended and incurred for the support, education and maintenance of such distributee. Any moneys paid by him to the guardians of the distributees, towards their distributive interests, stand on a different principle. On these the administrator is entitled to no commissions.

Let the costs of this appeal be paid by the appellees; and let the costs in the court below be decreed by the chancellor, on the coming in and confirmation of the report.

BETTS *vs.* GUNN.

[BILL IN EQUITY FOR RESCISSION OR REFORMATION OF CONTRACT.]

1. *Rescission refused on account of plaintiff's laches and ratification after discovery of fraud.*—Equity will not rescind a contract, at the instance of the purchaser, when it appears that his bill was not filed within a reasonable time after his discovery of the alleged fraud; that he sold a portion of the property after the discovery of the alleged fraud, thus deprived himself of the power to place the defendant in *statu quo*, and did sundry other acts under the authority of the rights conferred on him by the contract.
2. *Reformation refused.*—Chancery will not reform a written contract, by the insertion of a stipulation which was designedly omitted from the writing, and trusted to the defendant's honor.
3. *Compensation in equity.*—Where a purchaser files a bill in equity for the reformation or rescission of a contract on the ground of fraud, but fails to establish his case on either point, the court has no jurisdiction to render a pecuniary judgment in his favor, for moneys advanced and paid out by him under the contract, or for damages resulting from the defendant's fraudulent representations and breach of warranty of title.
4. *What relief may be granted under general prayer.*—Where the bill prays the rescission of a contract on the ground of fraud, the cancellation or (in the alternative) reformation of the instrument which evidences the plaintiff's liability, and an account of the matters growing out of the contract, the court may, under the general prayer for other and further relief, establish an equitable set-off in favor of the plaintiff, though denying the relief specially prayed.
5. *Equitable set-off.*—Plaintiff having purchased defendant's property, and promised, in consideration thereof, to pay a specific amount of defendant's outstanding debts, and to allow him a life annuity, a court of equity will, on proof of defendant's insolvency, establish an equitable set-off in favor of plaintiff, against his liability for the annuity, on account of damages resulting from a breach of defendant's warranty of title to the property conveyed; money paid by plaintiff, at defendant's request, outside of the contract; board and other necessaries furnished, and professional services rendered as an attorney-at-law; *secus*, as to a demand for unliquidated damages arising out of a tort, and professional services rendered in suits by and against plaintiff himself concerning the property.

APPEAL from the Chancery Court of Macon.
Heard before the Hon. A. J. WALKER.

THIS bill was filed by George W. Gunn, against Elisha Betts. Its primary object was to obtain the rescission of a contract, by which Gunn, in consideration of a conveyance to him by Betts of certain real and personal property,

bound himself to pay the outstanding debts of Betts, and also to allow him $200 *per annum* for his support. The contract was made in 1843, and the bill filed in October, 1850. The written instrument signed by Gunn only bound him to pay the annuity; but the bill alleged, that it did not truly express the contract of the parties. The bill alleged, also, in substance, that Betts represented his debts as amounting to not more than $1,000, while complainant was compelled to pay more than $2,000 on account of them; that he also misrepresented the value of the property conveyed; that complainant was unable to reduce some of the property to possession, because of conflicting and superior claims of title to it, and was much involved in litigation concerning it; that he supplied Betts with money for traveling, and furnished him with board and other necessaries. The prayer of the bill was, that the contract might be rescinded, and the plaintiff's obligation canceled, or so reformed as to express the true contract of the parties; that an action at law, instituted by Betts on the obligation, might be perpetually enjoined; that an account might be taken of all the moneys advanced or paid out by the plaintiff for Betts, and of the value of the services rendered by plaintiff in lawsuits concerning the property conveyed to him by defendant; and for other and further relief.

The cause was heard before Chancellor Clark, on motion to dismiss the bill for want of equity, and to dissolve the injunction on the coming in of the answer; and before Chancellor Walker on pleadings and proof. Each chancellor held, that the bill presented no case for a rescission or reformation of the contract, but might be retained to establish an equitable set-off in favor of the plaintiff, on account of the insolvency of the defendant; and, on final hearing, a reference of the matters of account was ordered.

Errors are here assigned, by consent, by each party. The assignments of error for the defendant are, the overruling of the demurrer to the bill for want of equity, and the final decree in favor of the complainant; for the plaintiff, the refusal of the chancellor to grant a rescission or reformation of the contract, and to allow plaintiff's claim

for damages resulting from defendant's fraud as a part of his equitable set-off.

CLOPTON & LIGON, for the defendant.
JAMES E. BELSER, for the plaintiff.

WALKER, J.—The complainant is not entitled to a rescission of the contract described in the bill, because there is no offer on his part to place the defendant in *statu quo*, and he has deprived himself of the power to do so, by a sale of a portion of the property conveyed, after he was informed of the existence of the fraud alleged; and he has waited an unreasonable length of time, after the alleged perpetration of the fraud and his knowledge of it, before filing the bill; and, knowing the fraud, he has done sundry acts under the authority of the rights conferred upon him by the contract.—See Reavis' Digest, 303–306, where the numerous decisions of this court are collected.

2. There is plainly no equity in the bill, as an application for the reformation of the contract; because the bill shows that the contract was drawn precisely as both parties intended it should be drawn. The complaint is, not that a mistake was committed in the drawing of the instrument, but that the defendant has not performed a part of the antecedent verbal agreement, which was *designedly* left out of the written contract, and trusted to the defendant's honor. It is desired to add to the contract a stipulation which, according to the complainant's bill, was intentionally left out, under the influence of a confidence in defendant, which subsequent events prove to have been misplaced. The bill says that the subject was called to the attention of the defendant, and he avoided giving his consent to the insertion of the stipulation in question, saying, "the complainant certainly had enough confidence in him to trust to his honor in that particular." It is thus manifest from the bill itself, that the defendant did not consent, but designedly omitted to consent, that such a stipulation should be in the contract. Before we can grant the relief asked, it is necessary, therefore, that

we should make a contract for the parties, instead of reforming one actually made. For a clear exposition of the law upon this subject, we refer to Parsons on Contracts, vol. 2, pp. 8–10.

3. This court has no jurisdiction to render a pecuniary judgment, for money advanced and paid out for defendant, or for damages resulting from the defendant's fraudulent representations, and the breach of the defendant's warranty of title. The complainant's remedy for those purposes is at law, unless he has a remedy for them as an equitable set-off,—a question hereinafter considered.

4. The complainant is entitled to no relief upon the facts stated in the bill, unless it be to an equitable set-off against the liability to the defendant, which is the relief allowed in the court below. It is contended for the defendant, that the chancellor erred in allowing to the complainant relief by way of set-off. The argument in support of this proposition is, that such relief is inconsistent with the specific prayer, and, therefore, not grantable under the general prayer for relief. The cases of Thomason v. Smithson, 7 Port. 144, and Simmons v. Williams, 27 Ala. 507, decide, that where there is a general and a special prayer, relief will not be granted under the general prayer, which is inconsistent with the special prayer. Conceding the correctness of this principle, it does not apply in this case. The bill contains the general prayer, and the following special prayers: that the instrument which evidences the complainant's liability to the defendant may be canceled; that the defendant may account for all payments and advances made by the complainant, over and above the amount he ought to have paid by his purchase; that the said instrument may be reformed, if not canceled; and that the defendant may account for the property conveyed, of which the complainant was unable to obtain possession. The allowance of a set-off is inconsistent with no one of the special prayers, save that for a cancellation of the written evidence of the complainant's indebtedness. It is not only perfectly consistent with the rest, but would seem to be a proper consequence of the prayer that the defendant

account. The rule invoked by the defendant is not susceptible of such an application, as would deny relief under the general prayer, because the relief is inconsistent with one special prayer, while it is consistent with all the rest, and most appropriately connected with one of the prayers for relief. The complainant has, unquestionably, the right to vary the prayer for relief, to meet every shape in which he may apprehend relief may be granted to him. Driver v. Fortner, 5 Porter, 9; May v. Lewis, 22 Ala. 646; Strange v. Watson, 11 Ala. 324; Kelly v. Payne, 18 Ala. 371; Goodwin v. McGehee, 19 Ala. 475. If the allegations of the bill make a proper case for relief, the complainant is entitled to it, notwithstanding it is not specifically prayed, and the bill may indicate that such relief was not anticipated when it was exhibited.

5. The defendant's insolvency is an established fact in the case. The claim for damages, on account of the breach of warranty of title, was not, under the law existing in this State before the Code, the subject of a set-off at law. The complainant has no adequate remedy at law. The defendant's claim against him is an annuity for life. He is liable to a suit at law, at the expiration of each year, for the annual installment. The defendant's liabilities to the complainant largely exceed the installment due when the suit was commenced. The complainant is justly entitled, not only to defeat the pending suit upon so much of the annuity as has accrued, but to balance his claims against his liability upon installments to become due in future. The defendant's insolvency and the character of the complainant's liability, under the law as settled by the previous decisions of this court, make this, beyond all question, a proper case for the set-off of all the complainant's just debts, and his claim to damages for the breach of warranty.—T., C. & D. R. R. Co. v. Rhodes, 8 Ala. 207; Wray v. Furniss, 27 Ala. 471; Donelson v. Posey, 13 Ala. 752; Carroll v. Malone, 28 Ala. 521; French v. Garner, 7 Porter, 549. The bill shows, with sufficient certainty, that, at the time when the contract between complainant and defendant was entered into, it was mutually understood between the parties that the

complainant was to pay the defendant's existing debts. Certainly the defendant expressed a wish that he should do so. The complainant bound himself to pay only one thousand dollars of the debts, and the defendant represented that as the outside amount which his debts would make. Although there was no contract that the complainant should pay the defendant's debts, it was expected and requested by the defendant that he should do so. The bill, in this respect, is fully sustained by the proof, if not by the admissions of the answer. To render the defendant liable, it is not necessary that the complainant should have paid the debts of the defendant in pursuance to the obligations of a contract: it is sufficient that such payments were made in pursuance to the request of the defendant. It follows, that all payments of the defendant's debts existing at the date of the sale, beyond the sum of one thousand dollars, which the complainant contracted to pay, constitute an indebtedness in favor of the complainant against the defendant, and a proper matter of set-off in this case.

If the complainant had been evicted from the possession of the property sold to him, under a paramount title, he might have recovered the counsel fees in the suit which resulted in his eviction, by way of damages for the breach of warranty of title. But there is no averment of any such eviction. The counsel fees of the complainant, in suits to which he was a party, and which were brought by or against him in reference to the property after his purchase, cannot be a charge against the defendant. For the services, however, rendered by the complainant in suits for and against the defendant, he would be entitled to compensation from the defendant, as he would from any other person for similar services. The fact that the complainant contracted to pay a specified amount of the defendant's debts, produced no legal obligation to attend to lawsuits or any other business for the defendant; and for all the services rendered by the complainant for the defendant, in and about his lawsuits, the defendant is legally liable to the complainant, and the complain-

ant is entitled to have the same set off against his liability to the defendant.

Unliquidated damages, resulting from a fraud, and recoverable in an action of tort, are not the subject of a set-off, either at law or in equity.—Pulliam v. Owen & Russell, 25 Ala. 492. The complainant is, therefore, entitled to no relief in this case, on account of the fraud alleged in this bill, even if it be proved, of which we are by no means certain.

If there was any contract that the defendant was not to pay for board, the use of a horse, and servant hire, during his stay at the complainant's house, it was merely verbal, and it cannot be established in contravention of the written contract. The proof does not establish that the board, servant, and horse hire were gratuitously bestowed by the complainant; and we think, that he is entitled to a reasonable compensation for those things.

It follows from what we have said, that all advancements of money by the complainant to the defendant constitute an indebtedness of the latter, which is a proper matter of set-off in this case.

The final decree, rendered by the chancellor who heard the case upon the pleadings and proof, is not altogether consistent with the principles above laid down, and it must be reversed; and a decree must be here rendered, such as we think the court below ought to have rendered. A comparison of the foregoing opinion with the chancellor's decree will show, that the decree contains an error prejudicial to the complainant, in its omission to allow him, unconditionally, a credit for all payments of the defendant's debts existing at the date of the contract; and that it contains an error prejudicial to the defendant, in the improper allowance to the complainant for a certain class of cases. The decree must, therefore, be reversed upon the assignment of errors, and also upon the cross assignment of errors; the complainant must pay the costs of the reversal upon the appeal, and the defendant the costs of the reversal on the cross assignment of errors; and the cause must be remanded for further proceedings under the following decree:

It is ordered, adjudged, and decreed, that a right of set-off in complainant's favor, against the defendant's installment of two hundred dollars *per annum*, be and is hereby established; and that the set-off shall consist of debts of the following description, to-wit: for payments in discharge of the debts of defendant existing on the 10th March, 1843; for services rendered by the complainant for the defendant, in attending to the business of the defendant, and in and about the lawsuits for and against the defendant; but not for services by the complainant in and about his own lawsuits, or in and about lawsuits of his own concerning the property purchased by him, rendered after the purchase; and also for all money advanced to the defendant, for board, servant hire, and horse hire, and for the goods and chattels furnished the defendant and alleged in the bill to have been furnished to him.

The registrar of the chancery court for Macon county is hereby required to take an account between the complainant and defendant, in which he shall charge the defendant with all debts of the above stated descriptions established before him, and interest on them from the date when they respectively accrued; and charge the complainant with the sum of two hundred dollars *per annum*, commencing on the 10th March, 1843, and interest on each installment from the end of the year; and shall ascertain and report to the said chancery court the date at which the said installments and interest on the same will amount to a sum equal to the said debts and interest on the same up to the same time; and upon the confirmation of said report, the defendant shall be perpetually enjoined from prosecuting or instituting any suit for the recovery of any installment of said annuity, or any part of such installment, accruing before the time at which such installments and interest shall equal the said debts and interest. The injunction heretofore granted is retained, to abide the further order of the court below; and the question of costs in the court below is left open for the decision of the chancellor, upon the coming in of the registrar's report. Upon the taking of the said account, the registrar may

exercise the powers, and follow the rules of evidence, prescribed in section 2934 of the Code, which is by this decree made the rule of his authority in this case.

BROOKS *vs.* MOBILE SCHOOL COMMISSIONERS.

[ACTION AGAINST LICENSED AUCTIONEER TO RECOVER SCHOOL TAX.]

1. *General rule for construing statutes.*—Statutes are to be so construed, if possible, as to give some effect to every clause, and not to place one portion in antagonism to another.
2. *Construction of act of* 1856 *respecting public schools in Mobile.*—The act of 1856, "supplementary of an act entitled 'an act to regulate the system of public schools in Mobile county,' approved January 16th, 1854," (Session Acts 1855-6, p. 148; *ib.* 1853-4, p. 190,) does not repeal that provision of the former statute which directed the collection and appropriation to school purposes of a tax on auction sales.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by the appellees, against Augustus Brooks, a regularly licensed auctioneer in and for the city and county of Mobile, to recover the school tax on the amount of auction sales made by the defendant from the 15th February, 1856, to the commencement of the action. The parties waived a trial by jury, and submitted the cause to the decision of the court, "on the facts and law" arising on the following agreed case: "It is admitted, that the defendant was regularly appointed an auctioneer for Mobile county on the 5th March, 1856, having complied with all the requirements of the law regulating auctioneers, and was a duly authorized auctioneer in the city of Mobile on or before the 15th February, 1856; that, as such auctioneer, he has sold $37,386 worth of property, and has received the same; and that he has not paid to the said school commissioners the tax assessed by the act of January 16, 1854, amounting to

$186, 93, or one half of one per cent. on the amount of said sales." The court rendered judgment for the plaintiffs, and its judgment is now assigned as error.

The acts of 1854 and 1856, respecting the public schools in Mobile, the construction of which is involved in the case, may be found in the Session Acts of 1856, p. 148, and Session Acts of 1853–4, p. 190; and the material portions of them are also copied into the report of the case of Holt v. Mobile School Commissioners, 29 Ala. 451.

E. S. DARGAN, for the appellant.

STONE, J.—In Holt v. School Commissioners of Mobile, 29 Ala. 451, we placed a construction on the statute of February 15, 1856, which must be decisive of this case. In that case, it was argued, that the act above referred to repeals the entire "act to regulate the system of public schools in the county of Mobile," approved January 16th, 1854.—Pamph. Acts, 1853–4, p. 190. We held, that the later enactment was only intended to repeal so much of the former statute "as authorizes *the levy of a tax on all subjects of taxation embraced in the revenue laws of the State, an amount equal to one-fourth of the amount levied by the commissioners of revenue of Mobile county for county purposes*," except licenses.

We are satisfied that the words above italicized were employed by the legislature, not to designate *the subjects of taxation*, as to which the right to tax was taken away, but to *point out* the portion of the statute intended to be repealed. The descriptive words of the repealing clause of the act of 1856, are the identical words found in the act of 1854, § 4, subd. 1. We showed in the former case, as we then believed, and now believe, that the repealing clause we are considering would not admit of a construction so large, as to repeal the entire statute of 1854. It being thus shown that the entire statute of 1854 is not repealed, the question arises, to what extent is it repealed? The repealing clause refers to something less than the whole act: what does it refer to? The words pointing to only a portion of the act, it follows that the repeal

operates only on that portion which is identified with reasonable certainty.

It is now argued, that inasmuch as all the subjects of assessment, enumerated in the act of 1854, are "subjects of taxation embraced in the revenue laws of the State," the repeal must be held to embrace all these subjects of taxation "except licenses;" that auction sales are a subject of taxation under our revenue laws, and that they are exempt from taxation at the hands of the school commissioners.

We would adopt this construction, if the words, "subjects of taxation," stood alone and unexplained in the act of 1854. They are, in themselves, comprehensive enough to embrace every subject of assessment found in our revenue laws. But they do not stand alone. In section 4 of that act, subdivision 1 provides for "all subjects of taxation embraced in the revenue laws of the State, except licenses;" subdivision 2 provides for "auction sales;" subdivision 3, for "license taxes." We must so construe this statute, if possible, as to give to each clause some effect, and not to place one portion in antagonism to another. If the words, "all subjects of taxation embraced in the revenue laws of the State," be understood in their literal import, they certainly comprehend auction sales. This construction would force us to one of the two alternatives, either to declare the second subdivision of section 4 wholly inoperative, or to hold that the act of 1854 authorized a double assessment on auction-sales—first, of "one-fourth of the amount levied by the commissioners of revenue of Mobile county," under subdivision 1; and, second, of "one-half of one per cent. on all actual sales," under subdivision 2. Each of these constructions would lead to results alike unauthorized and absurd.

The true construction, we are satisfied, gives to each of these subdivisions a separate field of operation.

We hold, then, that subdivision 1 provides for subjects of taxation, other and different from those embraced by subdivisions 2 and 3. We hold further, that the words of reference in the act of 1856, which are copied from the

act of 1854, must, in the very nature of things, be understood in the same sense in each statute. Thus understood, the true sense and operation of those statutes, as they now exist, may be ascertained by reading the act of 1854 as if the 1st subdivision of section 4 were stricken out; and the act of 1856, omitting the repealing clause.

The judgment of the city court is in strict conformity with these views, and is affirmed.

DeJARNETTE'S EXECUTOR *vs.* McQUEEN.

[ACTION AT LAW BETWEEN PARTNERS FOR CONTRIBUTION.]

1. *When action at law lies between partners.*—If, after the dissolution of a partnership, the several partners sign their individual names to a note for a partnership debt, and one afterwards pays off this note, he cannot maintain an action at law against the others for contribution.
2. *Same.*—An agreement between two co-partners, after dissolution of their firm, to the effect that they would "quit even" to avoid the expense of a chancery suit, does not authorize one to maintain an action at law against the other, to recover contribution for a partnership debt subsequently paid.

APPEAL from the Circuit Court of Autauga.
Tried before the Hon. E. W. PETTUS.

THIS action was brought by the executor of John P. DeJarnette, deceased, against Murdock McQueen. The complaint contained the common counts in assumpsit under the Code. The defendant pleaded, in short by consent, *non assumpsit*, payment, set-off, and the statutes of limitation of three and six years. The facts disclosed on the trial, as the same are stated in the bill of exceptions, were, in substance, these: A partnership had existed between the plaintiff's testator, the defendant, and one Sutherlin. After the dissolution of the firm, the several partners executed to one John McBride two promissory notes, for the amount of a partnership debt; signing their

respective individual names. The plaintiff, as executor of John P. DeJarnette, paid off the balance due on these notes, and brought this action to recover contribution. Sutherlin had removed to Louisiana before this payment was made. A witness for the plaintiff testified, that he, as an attorney-at-law, "advised the plaintiff and defendant that a settlement of the business of the firm could only be forced by a long and difficult chancery suit, and advised them to quit even; to which both assented." On this evidence, the court charged the jury, in effect, that the plaintiff could not recover. The plaintiff reserved an exception to this charge, and he now assigns it as error.

WM. H. NORTHINGTON, and ELMORE & YANCEY, for the appellant, cited Lyon v. Malone, 4 Porter, 501; Neale v. Turton, 4 Bing. 149; Nevins v. Townsend, 6 Conn. 5; Gibson v. Moore, 6 N. H. 547; Sawyer v. Proctor, 2 Conn. 480; Van Ness v. Forrest, 8 Cranch, 30; Collyer on Partnership, §§ 272, 274, 269, 281.

WATTS, JUDGE & JACKSON, *contra.*

WALKER, J.—The general proposition, that one partner cannot sue another at law, to recover the due proportion of a partnership debt paid by the former, is not denied; but it is contended that the execution of the notes by the partners in their individual names deprives the debt of its character as a partnership liability, and converts it into an individual debt, as between the partners; and also that the agreement between the plaintiff and defendant "*to quit even*" gave to the former the right to maintain this action at law.

The cases cited upon the brief of appellant's counsel do not sustain the argument, that the mere fact that the partners subscribe their separate names to notes, given for a partnership liability, withdraws them from the partnership, and makes them the joint and several debt of the partners between themselves as distinct and unconnected individuals. The cases in which a partnership matter has been regarded as withdrawn from the partnership, are those where one partner has made separately a

promise to one or several of his associates. Such was the character of the transaction in Lyon v. Malone, 4 Porter, 497; Coffee v. Brian, 3 Bing. 54, (11 E. C. L. 25;) Jackson v. Stopherd, 2 Crom. & M. 361; Wilson v. Cutting, 10 Bing. 434, (25 E. C. L. 187;) and in the cases commented upon by the court in Lyon v. Malone, *supra*.

An agreement that the partners shall be liable to each other for contribution, otherwise than in their associate capacity, cannot be legitimately inferred from the fact of their signing their respective names to the notes. The security does not in any wise change the nature of the debt. The liability of the partners after the execution of the notes, as before, was joint and several, and it was precisely the same as if the note had been executed in the partnership name. The effect of an execution of the notes by the partners in the partnership name would have been to evidence the same liability, as if they had signed their respective names. When a partnership owes a debt, and all the partners sign a note for that debt, they give a security imposing upon the partners a liability not inconsistent with that which pertains to their relationship; and there is, therefore, in the act of giving such security, no evidence of a design to change the character of the debt.

The taking of the joint and several notes of the partners did not, of itself, have the effect of extinguishing the partnership liability; and one who had taken such a note for a partnership liability might, under the statute of bankruptcy, prove the debt against the partnership assets.—Owen on Bankruptcy, 289–290; Story on Partnership, 369; Collyer on Part. §§ 910, 911, 941.

Upon their face the notes are the debts of the makers as individuals; but, when it is shown that they were given for a partnership liability, the presumption is overturned, and the makers, as between themselves, stand as partners. Such we understand to be the decision in Couch & Emmerson v. Bowman, 3 Humph. 209. The decision in Filley v. Phelps, 18 Conn. 294, is precisely in point, and lays down the principle, that a note joint and several in form, given by the individuals who compose a partnership, is a preferred claim against the partnership assets.

Upon the reasoning and authorities above stated, we think it a safe position, that the makers of the notes in question, as to their respective liabilities to contribute to the payment thereof, occupy as between themselves the relation of partners.

The agreement of the plaintiff and defendant in this suit "to quit even" may have amounted to a settlement of the partnership accounts, as between the parties to it, up to that time. It may have the effect of a mutual acquittance by the parties as to all liabilities subsisting at the time. But it cannot absolve from responsibility for subsequently accruing items of partnership account. It does not give to each party a right to collect for his exclusive benefit as much of the remaining assets as he might be able to get into his hands; nor does it impose upon the party who may happen to pay a debt the burden of bearing it alone; nor does it destroy the relation of partners as to subsequent matters. If the parties to this suit had formally and fully settled up every matter of partnership account existing at the particular time, it would not destroy the mutual liability to account as to all subsequent matters; and no greater effect can be conceded to the agreement set up in this case. If there be a liability to account as partners, as to all subsequent matters, it is clear that the proceeding to compel the account must be in chancery, and not at law. If an action at law could be maintained, there might be a suit at every occurrence of an item of account, and thus as many suits as there were subsequent items; and the plaintiff in this suit, if he recover from the defendant, might be compelled, in some other suit for contribution by the defendant, to restore the sum recovered. When a settlement has been had, and a balance struck, an action at law will lie for the recovery of the balance; but the rule does not extend to matters of partnership account afterwards accruing.

The judgment of the court below is affirmed.

LYON *vs.* ODOM.

[ACTION ON BOND OF INDEMNITY.]

1. *Presumption in favor of judgment.*—Where the regularity of the appointment of an administrator *de bonis non* is collaterally attacked, the order itself not showing why it is made, nor how, why or when the administrator in chief was removed; while neither the transcript nor the pleadings purport to set out all the facts connected with the appointment, or to contain an exemplification of the entire record of the probate court, the appellate court will presume, in favor of the ruling of the primary court, that a sufficient reason to justify the action of the probate court exists of record in that court.
2. *Validity of decree against administrator, in favor of "heirs when known."*—A decree of the probate court, rendered on the final settlement of an administrator's accounts; reciting that "it appears said administrator has received and is chargeable with" a specified sum, "and is entitled to credits amounting to" another specified sum, "leaving a balance of $232 in his hands, to be distributed among the heirs of said estate hereafter, when known;" and then ordering "that the preceding statement stand as the judgment and decree of this court, and, after said distribution, that said estate be held and esteemed finally closed,"—has not the requisites of a judgment, but is sufficient to authorize a decree against the administrator, on a proper proceeding, without further investigation of the accounts, unless he shows errors or mistakes in the account as stated.
3. *Ex-parte statement of administrator's accounts.*—Under the provisions of the Code, (§§ 1878–79,) authorizing the *ex-parte* statement of an account against an administrator "from the materials in the office of the probate judge," the perfection of publication is equivalent to personal service; and a former decree of the court, ascertaining a balance in his hands, but not in favor of any particular person by name, is a sufficient predicate for a final decree against him.
4. *Conclusiveness of decree of probate court.*—A final decree of the probate court, rendered on publication against an administrator, cannot be collaterally impeached, on account of irregularities which would reverse it on error, when the record shows that the court had jurisdiction of the parties and subject-matter.

APPEAL from the Circuit Court of Monroe.
Tried before the Hon. THOMAS A. WALKER.

THIS action was brought by Jesse T. Odom, against John Lyon and Garrett Longmire, and was founded on a penal bond, which was conditioned that Lyon should indemnify Odom "against all damages and costs" that

might be incurred by him, as the surety of one Leroy A. Kidd, on his official bond as the administrator of Joseph K. Rush, deceased; and which was executed in pursuance of a decree of the chancery court of Monroe, in a cause then pending therein between Odom, Lyon and Kidd, by which it was ordered, that a judgment at law against Odom, in favor of Kidd, and transferred by him to Lyon, should be perpetually enjoined, unless such bond was executed. The breach assigned in the complaint was, that plaintiff, as the surety of said Kidd, had been compelled to pay, under execution from the probate court, the amount of a decree rendered by said court on the 19th February, 1855, in favor of James P. Rush, as administrator *de bonis non* of said Joseph K. Rush, deceased, against said Leroy A. Kidd, the administrator in chief, on which decree an execution had been previously issued against said Kidd, and returned "no property found;" and that the defendants refused to repay this amount.

The defendants craved oyer of the condition of the bond, and pleaded, 1st, *nul tiel record;* and, 2dly, a special plea which was, in substance, as follows: That at the May term of said probate court, 1850, said Kidd made a final settlement of his administration on said estate, and a decree was then rendered against him by said court, "in favor of the heirs of said estate when known," for $232 32; that letters of administration on said estate were afterwards granted to R. C. Torrey, as administrator *de bonis non;* that afterwards, to-wit, in 1854, Torrey's letters were revoked by said court, and letters of administration *de bonis non* were granted to said James P. Rush; that at the January term of said probate court, 1855, said Rush filed his petition in said court, praying that the decree formerly rendered against Kidd, as above stated, might be rendered in his favor, as such administrator *de bonis non;* that at a special term of said probate court, held in February, 1855, a decree was rendered in favor of said Rush, as such administrator, against said Kidd, for $232 32, with interest from the 6th May, 1850; that an execution was afterwards issued on this decree, and returned "no property found; "all which proceedings of said orphans'

and probate court will more fully appear, by reference to the record thereof herewith filed."—"And said defendants aver, that said decree of said orphans' court, against said Kidd, and in favor of the heirs of said Joseph K. Rush, remains unreversed and unsatisfied; that neither said Kidd, nor said plaintiff and John J. Roach, his sureties, were made parties to the proceedings of said probate court set out in plaintiff's complaint, nor had they any legal notice thereof; that said decree in favor of Rush was without authority, and void, and not binding on plaintiff, nor was he obliged by law to pay the same," &c.

The plaintiff demurred to this special plea, 1st, for duplicity; 2d, because it states conclusions of law, instead of facts; and, 3d, because it is not a sufficient answer to the complaint. The court sustained this demurrer, and decided the issue joined on the plea of *nul tiel record* in favor of the plaintiff.

There is an agreement of counsel copied into the transcript by the clerk, in these words: "We agree, that the within copy of the proceedings of said orphans' and probate court may be inserted in the transcript in this case, if the same should be taken to the supreme court; and that it, together with the decree of said court dated 6th May, 1850, a copy of which is marked 'A'; and a copy of the chancellor's decree between said Odom and Lyon, may form a part of the pleadings, as fully as if inserted therein, and whatever else the parties may deem necessary of any record connected with the case."

The transcript from the records of said probate court, as set out under this agreement, contains the following proceedings:

1. The decree of May 6th, 1850, against said Kidd, the material portion of which is as follows: "It appears that said administrator has received and is chargeable with the sum of $1318 89, and that he is entitled to credits in the sum of $1086 57, leaving a balance in his hands of $232 32, to be distributed among the heirs of said estate hereafter, when known. Ordered, that the preceding statement stand as the judgment and decree of said court, and, after said distribution, that said estate be held and

esteemed as finally closed. It is further ordered, that the account current, as stated, be recorded and placed on file."

2. A decretal order of the April term, 1854, revoking the letters of administration previously granted to R. C. Torrey, and granting letters to James P. Rush.

3. The petition of said Rush, which was filed on the 8th January, 1855, reciting the rendition of the former decree against Kidd, alleging that the same had not been paid or satisfied, and praying that a decree might be rendered in his favor, as administrator *de bonis non*, for the amount of said decree, with interest thereon; and the order of the court, made at the January term, 1855, appointing the third Monday in February then next for the hearing of said petition, and directing "that notice thereof be given, by publication in the *Claiborne Southerner*, for three successive weeks, so that all persons concerned may, if they think proper, appear and contest the same."

4. A decree, rendered at a special term held on the 29th February, 1855, in these words: "This day came James P. Rush, administrator *de bonis non* of Joseph K. Rush, deceased, by attorney; (the same having been appointed for the hearing of his petition, praying that a decree may be rendered in his favor, as administrator as aforesaid, against L. A. Kidd, former administrator of said estate, for the amount of a certain decree heretofore rendered against said Kidd as such administrator, but not in favor of any particular person;) and the notice required by a previous order of court having been given; and no person appearing to contest said petition; and the court being satisfied that the facts therein set forth are true: It is, therefore, ordered and decreed, that James P. Rush, administrator *de bonis non* on the estate of Joseph K. Rush, deceased, do have and recover of and from said Leroy A. Kidd, former administrator of said estate, the amount of said decree, to-wit, the sum of $232 32, with interest from the rendition thereof, to-wit, the 6th May, 1850; for which execution may issue."

5. A *fi. fa.* on this decree, purporting to be issued on the 26th *February* (*?*) 1855, received by the sheriff on the 7th May, and returned, on the 11th June, "no property

found;" an order of court, made at the August term next following, reciting the issue and return of this execution, and directing the issue of an execution against the administrator and his sureties; and the execution thereon issued against said sureties, with their principal, under which plaintiff paid the money which he seeks to recover in this suit.

The rulings of the court on the pleadings are now assigned as error.

D. C. Anderson, for the appellant.

S. J. Cumming, *contra.*

STONE, J.—It is one of the admitted facts in this record, that Odom paid the money which he seeks to recover out of Lyon, and for which he obtained a judgment in the court below. Whether he paid it without authority, or under legal coercion, is the question on which the result of this case must depend.

It is here argued for appellant, that the appointment of James P. Rush, as administrator *de bonis non* of the estate of Joseph K. Rush, deceased, was and is void, because the record does not show the jurisdictional facts. There is nothing in this record which enables us to determine this question in favor of the appellant. The plea admits the removal of Kidd, the administrator in chief, and the appointment of Rush. True, the record from the probate court of Monroe does not inform us how, why, or when Kidd was removed; nor why Torrey was removed, and Rush appointed, as second administrator *de bonis non.* The agreement of counsel, taking the place of a bill of exceptions, does not purport to exemplify the whole record, or to set out all the facts. Neither can we discover that this was a question in the court below. Under these circumstances, we feel it our duty, to indulge every reasonable presumption in favor of the ruling in the primary court; and to presume that a good and sufficient reason exists, of record in that court, to justify its action. See School Commissioners v. Godwin, at last term, and authorities cited.

The pleadings, however, do raise the question of the validity of the decree in favor of James P. Rush, and against Leroy A. Kidd. That judgment was rendered on the petition of said James P. Rush, and without any personal service on Kidd, or his sureties. The record informs us that publication was made; and the court took jurisdiction of the case on the constructive service in that way perfected. Did the law authorize notice to be given by publication, in the case made by the petition in this record?

In the absence of our statutes on the subject, an administrator *de bonis non* has no authority to reduce to possession any assets of the estate, other than such as remained in *specie*, and unadministered by the administrator in chief. These assets were not in that condition.—Kelly v. Kelly, 9 Ala. 908; Venfris v. Smith, 10 Peters, 161; Nolly v. Wilkins, 11 Ala. 872. The statute "to regulate settlements in the orphans' court," approved February 4, 1846, enlarged the powers of the administrator *de bonis non*, and allowed a decree in his favor, for any balance found against the administrator in chief on his final settlement.—Pamph. Acts, p. 14. The Code (§§ 1876–7) provides for a like decree on the final settlement made by an administrator in chief.

It will be remembered that, in this case, the administrator in chief had so far settled his administration, as to show a balance in his hands, which the court directed should be paid to the heirs (distributees?) when known. This was not a decree. We think, on a proper proceeding, this decreed balance, if the administrator *de bonis non* or distributees so elected, might have been decreed against the administrator, without further investigation of the accounts, provided he did not show he was entitled to further credit or abatement.

If in this proceeding for the admitted balance, the administrator in chief had been served with personal notice of the filing and purposes of the petition, or if he had come in and made himself a party, no one would say that a judgment rendered on this state of facts would not

be upheld.—Code, § 1877. There was here neither personal notice, nor a waiver of it.

In this case, the regularity of the judgment of Rush v. Kidd, comes up collaterally; and unless the judgment is void, it will not be declared inoperative, because of any errors or irregularities that may be found in the record. If the court had jurisdiction of the subject-matter and the parties, no matter how informal the proceedings, they would authorize the payment of the money by Odom, and entitle him to recover in this action.—Parmer v. Ballard, 3 Stew. 326; Duncan v. Ware, 5 Stew. & Por. 119; Story's Conflict of Laws, §§ 545 to 550; authorities cited in Smith, administrator of Hunt, v. Ellison's Heirs, at the present term.

The Code (§ 1878) authorized the probate court to state an account against the administrator in chief, "from the materials in his office." Here the materials consisted of an admitted balance in his hands. True, no formal statement of the account was made out; and probably, on error, we would reverse the case. Proceedings, however, were set on foot, and the court took action on those proceedings. These proceedings plainly disclosed a purpose to charge the administrator in chief with that admitted balance, and that a decree for that amount would be moved for against him. It is probable that we need not look to the petition in sustaining this decree, assailed as it is collaterally. The administrator was regularly notified by publication, under section 1879 of the Code. Whether the account was stated before or after the publication, was perhaps an immaterial inquiry, when the record came up collaterally. If the account was not stated before publication, this irregularity would, on appeal, secure the reversal of the case.

However the question last considered would be determined, if the record disclosed no other proceedings, we are satisfied that, in this case, although greater formality might have been observed, the decree of the probate court of Monroe was not void; and consequently, Odom was authorized to pay the amount of the decree to the administrator *de bonis non*. Having paid it, a right of

action accrued to him on the bond of indemnity. Thus construed, the plea of defendant opposed no defense to the plaintiff's action, and the demurrer to it was properly sustained.—The State v. Richmond, 6 Foster, 232–243–4; Brown v. Webber, 6 Cush. 560.

The judgment of the circuit court is affirmed.

ALEXANDER'S ADM'R *vs.* ALEXANDER.

[PARTIAL SETTLEMENT AND DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *Mississippi statute of descent and distribution.*—Under the Mississippi statute regulating the descent and distribution of the estates of intestates, as the same is set out in the record in this case, an illegitimate child takes equally with legitimate children in the estate of their deceased mother.

APPEAL from the Probate Court of Autauga.

IN the matter of the estate of Mary Ann Alexander, deceased, who died in Mississippi, leaving personal property in the county of Autauga, Alabama, on which administration was granted by the probate court of Autauga. On the settlement of the administrator's accounts, it was ascertained that there was a balance in his hands for distribution, amounting to over $2,000. It further appeared, that the decedent left two children surviving her, William H. Alexander and Henry C. Alexander, the latter being an illegitimate child. Two statutes of Mississippi, one regulating the descent and distribution of decedents' estates in cases of intestacy, and the other "granting power to the circuit and chancery courts to legitimatize bastard children, to alter or change names, and for other purposes," were read in evidence in the court below. The material portion of the former of these statutes is copied in the opinion of the court; the latter requires no particular notice, as no question is here raised in reference to it. On these facts, the probate court refused to render

a decree in favor of the legitimate child for the entire amount in the administrator's hands, but divided the fund equally between the two children. The administrator excepted to these rulings of the court, which he now assigns as error.

C. S. G. Doster, for the appellant.

William H. Northington, *contra.*

WALKER, J.—The only point made in this case is, that the court erred in construing the Mississippi statute which governed the distribution of the fund in the administrator's hands, as authorizing the illegimate child of a deceased mother to share her estate equally with a legitimate child. The section of the Mississippi statute which pertains to the question is in the following words: "Hereafter, all illegitimate children shall inherit the property of their mothers, and from each other as the children of the half blood, according to the statute of descents and distributions now in force in this State."

We do not think this statute admits of a construction, which would exclude an illegitimate child from sharing with a legitimate child, in the property of their deceased mother. To so construe it would make an exception not provided for in the law itself, and do violence to its language. Leaving out so much as pertains to the inheritance of bastard children from each other, the language is, "that illegitimate children shall inherit the property of their mothers according to the statute of descents and distributions now in force in this State." This statute, in our judgment, by saying that illegitimate children shall inherit the property of their mothers, neither means that they shall take alone to the exclusion of legitimate children, nor that they shall take only in default of legitimate children. But it was designed to remove the disability incident to their bastardy, so far as to allow them to take under their mothers, and to permit them to stand as heirs and distributees of their mother under the statute of descents and distributions. They are as fully provided for as though the statute had in express terms repealed

the disability of bastardy, as to the inheritance and distribution of the mother's estate, and placed them on an equal footing with legitimate children.

The distinction of whole and half blood has no application in the case. The legitimate and illegitimate child alike take directly from the mother. The clause relating to the whole and half blood has reference to the inheritance of bastard children from each other.

The decree of the court below is affirmed.

MABRY *vs.* DICKENS.

[MOTION TO DISMISS SUIT FOR WANT OF SECURITY FOR COSTS.]

1. *When appeal lies.*—An appeal does not lie from an order of the circuit court, overruling a motion to dismiss the suit for want of security for costs.
2. *Jurisdiction by consent.*—Consent of parties, express or implied, cannot confer on the appellate court jurisdiction of a cause in which there is no final judgment to support the appeal.

From the the Circuit Court of Barbour.

Tried before the Hon. S. D. HALE.

IN this case, as the bill of exceptions shows, the defendant moved to dismiss the suit, on the ground that the plaintiff, being a non-resident, had not given security for the costs. The court overruled the motion, and the defendant excepted; and he now assigns the ruling of the court as error.

L. L. CATO, for the defendant.

PUGH & BULLOCK, *contra.*

STONE, J.—In this case, no appeal has been taken to this court; nor has a final judgment been rendered in the court below, from which an appeal could be taken. While the joinder in error may, under the authority of Thompson v. Lea, 28 Ala. 453, operate a waiver of the want of an appeal, the parties cannot waive a final judgment, and, by consent, give this court jurisdiction of the case.—Code, § 3016. Appeal dismissed.

COLE *vs.* VARNER.

[BILL IN EQIUTY BY FEME COVERT, AGAINST PURCHASER AT EXECUTION SALE AGAINST HUSBAND, FOR RECOVERY OF SLAVE.]

1. *What witness may state.*—A witness may testify, in general terms, that he "*loaned*" a slave to another person.
2. *Distinction between gift and loan.*—When a father sends a slave home with his newly married daughter and her husband, the law presumes that a gift was intended, unless a different intention is expressed at the time; or, if a loan is declared, while the father has a positive intention never to exercise the rights of an owner in reference to the slave, the transaction cannot be distinguished from a gift; but, if a loan is declared, it cannot be converted into a gift, by the mere fact that the father had not then determined whether or not he would permit the slave to remain forever with the bailee.
3. *Declarations against interest, and explanatory of possession.*—The admission of the husband, while in possession of a slave, to the effect that he held under a loan from his wife's father, and was willing that the latter should convey the slave to the wife, are admissible evidence against a purchaser at execution sale against the husband, under a judgment subsequently rendered.
4. *Validity of voluntary conveyance.*—A voluntary conveyance cannot be avoided by a subsequent creditor, without proof of an actual fraudulent intent.
5. *Possession referable to title.*—The possession of a slave by the husband, under a gift from his father-in-law for the sole and separate use of his wife, will be referred to the wife's title, when it is shown that he and his wife were then living together.
6. *Statute of frauds as to proof of gift.*—A voluntary conveyance of a slave, to the sole and separate use of a married woman, is not required to be acknowledged or proved in open court, when it is shown that the possession remained with the husband and wife under the deed.
7. *When wife may come into equity.*—A married woman, whose separate personal property has been sold under execution against her husband, may come into equity for its recovery, where no trustee was appointed by the deed which created her separate estate.

APPEAL from the Chancery Court of Lowndes.
Heard before the Hon. WADE KEYES.

THE bill in this case was filed by Mrs. Susan E. Varner, suing by her next friend, against her husband, William G. Varner, and John M. Cole; and sought to recover a slave named Milly, whom Mrs. Varner claimed as her separate property, under a deed of gift from her father, John Varner, and whom said Cole had purchased at sheriff's

sale, under execution against said William G. Varner. The bill alleged, that complainant and said William G. Varner were married in Lowndes county, Alabama, in 1837; that her father, shortly after her marriage, loaned her a slave named Sydna, who remained in the possession of her husband and herself, under said loan, until the 12th April, 1842, and, in the meantime, gave birth to the slave now in controversy; that on the 12th April, 1842, said John Varner executed a deed of gift for said slaves, which is made an exhibit to the bill, by which he conveyed them to complainant, for her sole and separate use, during her life, and at her death to her children; that said William G. Varner, at the same time, executed a written instrument, which is also made an exhibit to the bill, and by which he admitted that he held said slaves under a loan from John Varner, and consented and requested that they should be conveyed by said John Varner to complainant and her children; that the slaves remained in the possession of complainant and her husband, under said deed of gift, until some time in the year 1846, when they were levied on by a constable, under sundry executions against said William G. Varner; that the debts on which the judgments were founded, upon which these executions issued, were created long after the 12th April, 1842; that the plaintiffs therein were informed of the nature of complainant's title to the slaves, and indemnified the constable to make the levy; that notice of complainant's title was publicly proclaimed at the sale; that said Cole became the purchaser of the girl Milly, and received possession from the officer. The prayer of the bill was for the recovery of the slave, an account of her hire, and general relief.

The defendant Cole answered, insisting, 1st, that the slave Sydna, the mother of Milly, went into the possession of complainant and her husband, soon after their marriage, as a gift from her father, and not as a loan, and therefore the title vested in her husband; 2d, "that if a loan of said slave was pretended or declared, it was for an indefinite period, and for no specific object, and it is therefore competent to infer that a gift was intended, or

that there was a fraudulent intention to deceive creditors"; 3d, "that there was no deed in writing declaring the loan, and the property having remained in the possession of said William G. Varner for the space of more than three years, without demand by the said John Varner, an actual resumption of the possession of the property was necessary, in order to enable said pretended lender to convey the title as against even the subsequent creditors of said William G. Varner"; 4th, "that said pretended conveyance from John Varner was not proved and recorded as required by the statute of frauds"; 5th, "that said pretended conveyance, and also the written instrument signed by said William G. Varner, are fraudulent and void"; 6th, "that said pretended conveyance was never delivered, properly and *bona fide*"; and, 7th, "that defendant has had the adverse possession of said slave for more than six years."

On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, which is now assigned as error by the defendant Cole.

J. F. Clements, and Watts, Judge & Jackson, for appellant, made these points: 1. The slave Sydna, being sent by John Varner to the house of his daughter, then recently married, the law presumes that she was intended as a gift, in the absence of proof of a different intention publicly declared at the time of delivery. The subsequent declarations of the donor cannot be received, to show that the transaction was intended as a loan; nor is the testimony of John Varner, admitting its credibility, sufficient to establish a loan.—Miller v. Eatman, 11 Ala. 609; Burnett v. Branch Bank, 22 Ala. 642; Hitt & Wade v. Rush, 22 Ala. 563; Rumbly v. Stainton, 24 Ala. 712; Hill v. Duke, 6 Ala. 259; Norris v. Bradford, 4 Ala. 203; Falconer v. Holland, 5 Sm. & Mar. 689; Fitzhugh v. Anderson, 2 H. & M. 289; Torrence v. Graham, 1 Dev. & Bat. 284.

2. The title to the slaves having vested in the husband, his subsequent admissions, written or verbal, cannot avail to place the property beyond the reach of his creditors.

Hill v. Duke, 6 Ala. 259; Hitt & Wade v. Rush, 22 Ala. 563; Burnett v. Branch Bank, 22 Ala. 642.

3. The deed of gift from John Varner derives all its vitality from the consent of William G. Varner, John Varner being the mere conduit for passing the title from William G. to his wife. There being, then, no actual change of possession, and the deed not having been proved or acknowledged in open court, it is void as against subsequent creditors and purchasers.—Foster v. Mitchell, 15 Ala. 571; Sewall v. Glidden, 1 Ala. 52; Peek v. Myers, 2 Ala. 648; Sims v. Sims, 2 Ala. 217; Blakey v. Blakey, 9 Ala. 391; Hunley v. Hunley, 15 Ala. 91.

4. The complainant had an adequate remedy at law, and, therefore, could not come into equity to recover the property.—Colburn v. Broughton, 9 Ala. 351. The cases cited for the appellee, on this point, only decide that she might have filed a bill to enjoin the sale; not that, after permitting the sale to be made, she may recover the property by suit in equity.

Baine & NeSmith, *contra*.—1. Equity has jurisdiction of the case made by the bill.—Gerald v. McKenzie, 27 Ala. 169; Michan v. Wyatt, 21 Ala. 813; Crabb v. Thomas, 25 Ala. 216. In Colburn v. Broughton, 9 Ala. 351, cited for appellant, the title of the trustee had not been sold.

2. The testimony of John Varner shows clearly that the slaves were originally loaned by him to his daughter, and were held under the loan until the deed of gift was made in 1842. It was competent for him to testify that he *loaned* the slaves.—Nelson v. Iverson, 24 Ala. 9. The court will presume, in the absence of proof to the contrary, that all the facts necessary to constitute a loan existed.

3. The husband's written admission estops him from denying the loan, and is equally conclusive on a subsequent purchaser from him with notice.—Allen v. Smith, 22 Ala. 424; Pool v. Cummings, 20 Ala. 563; McCravey v. Remson, 19 Ala. 430; Inge v. Murphy, 10 Ala. 885.

4. The execution of the deed of gift by John Varner, before the lien of creditors had attached, was equivalent

to a resumption of the possession by him, and withdrew the property from the influence of the statute of frauds. McCoy v. Odom, 20 Ala. 507; Pharis v. Leachman, 20 Ala. 682.

5. It was not necessary that the deed of gift should be proved in open court, except as against the creditors of John Varner, who are not complaining. Moreover, the property remained with the donee.—McRae v. Pegues, 4 Ala. 165.

6. There is no proof of fraud in the transaction, nor does it appear that the husband was indebted at the time the deed of gift was made.

WALKER, J.—Upon the proof in this case we decide, that the negro woman Sydna went at first into the possession of the complainant and her husband under a loan. That proof consists of the testimony of John Varner, the father of the complainant, from whom the possession passed to her, and of the written admission of William G. Varner, her husband. John Varner testifies, that he loaned the slave to Susan E.; and that she retained possession under the loan, during a period of time which extended up to the making of the deed of gift, in 1842.

It is true that the law presumes a gift, when a father sends home a slave with his newly married daughter. This presumption is disputable, and may be overturned by adequate proof. It certainly would not be rebutted, by proof by the father of an unexpressed intent on his part to make a loan, and not a gift. The father's intention could only impress upon the transaction the character of a loan, when it was intelligibly avowed.—Burnett v. Br. B'k at Mobile, 22 Ala. 642. When the witness states positively, that the transaction was a loan; that he loaned the property to his daughter, and that she possessed it under the loan, we must understand him to mean, not that it was a loan because he had an uncommunicated and secret intention that it should be so; but that he transferred the property by way of loan, and so declared and avowed at the time, and that it was received and held as a loan, and in subordination to his title. The

fact of a loan involves other facts. It is a compound fact. It is distinguishable from a mere conclusion. It is permissible, under the decisions of this court, for a witness to prove, in general terms, that he loaned property.—Nelson v. Iverson, 24 Ala. 9; McKenzie v. B'k of Montgomery, 28 Ala. 606; Thomas v. De Graffenreid, 17 Ala. 602; Graham v. Tucker, 24 Ala. 606; Massey v. Walker, 10 Ala. 290; Douge v. Pierce, 13 Ala. 127; Parker v. Hagerty, 1 Ala. 730; Lawson v. Orear, 7 Ala. 784; Brice & Co. v. Lyde, at the present term; McGrew & Harris v. Walker, 17 Ala. 824.

2. We do not understand the cases of Norris v. Bradford, 4 Ala. 203, and Hill v. Duke, 6 Ala. 259, to assert that the mere entertainment by the lender of the idea that, by possibility, he might never resume the possession of the property loaned, would, of itself, convert the loan into a gift. The witness, John Varner, simply proves, that he had come to no definite conclusion, as to whether Mrs. Varner should keep the slaves for ever or not; and that he had no appointed time to take the slave from her. A loan for an indefinite period, and determinable at the will of the lender, may be created; and that loan can not be converted into a gift, by a disclosure from the lender that he was in an undetermined and unresolved state of mind, upon the question whether he should ever resume the possession of the property.—Gunn v. Barrow, 17 Ala. 747. If the father had a positive intention not at any subsequent time to exercise the rights of an owner in reference to the property, the transaction could not be distinguished from a gift. But that the lender revolved in his mind, and left undecided, the question whether he should not permit the property to remain in the possession of the bailee perpetually, could not absolve the bailee from the obligation resting upon him, as an incident to the bailment, to redeliver the property to the lender upon his demand; nor could it, in the absence of fraud, render the property liable to the debts of the bailee, created after the lender had resumed the control of it.

The effect which the pendency of such a loan may have

as to the creditors of the bailee or her husband, being such creditors before the resumption of the control of the property by the lender, is not a question in this case. It does not appear that any of the debts, under which the slave was sold, existed before John Varner resumed his dominion over it by making a voluntary conveyance of it to Mrs. Varner. There are no circumstances in the case, which authorize us to infer the existence of such debts before that conveyance; but the testimony conduces strongly to show, that they did not exist until afterwards. We can not intend, in the absence of proof for the defendant, the facts necessary to sustain the imputation of fraud. That those debts were created subsequently, was alleged in the bill, and not denied in the answer.

3. At the time when John Varner assumed dominion over the property, and exercised that dominion by making an absolute conveyance of it, William G. Varner admitted in writing that the previous holding of the property had been under a loan. At that time, William G. was in possession of the property; his declaration was explanatory of that possession, and was against his interest. This declaration was available as evidence, against one who claimed by subsequent purchase under an execution against him, in favor of a plaintiff whose debt was of subsequent creation.—Barnes & Barnes v. Mobley, 21 Ala. 232. This voluntary declaration corroborates and sustains the evidence of John Varner.

4. There is no evidence of fraud in the transaction. The proof conduces to show, that the dissipation of William G. Varner was the cause of the father's securing the property to the separate use of Mrs. Varner; but it is not shown that William G. Varner, at the time of the conveyance to Mrs. Varner, was at all indebted; nor does it appear that there was any design to defraud any subsequent creditors.

We do not think that the strong evidence of a gift, which is undoubtedly afforded by the continued possession by William G. Varner for four or five years without a resumption of possession by the lender, is sufficient, in the absence of all other evidence of fraud, to rebut the

positive testimony of John Varner, corroborated as it is by the admission of William G. Varner.

5. A decision in this case favorable to the complainant is the necessary result of the conclusion that John Varner, in 1842, made a valid deed of gift of the property to the separate use of Mrs. Varner. After that gift, the law would refer the possession to the title. The husband and wife lived together, and, of necessity, had a community of possession. The law cast upon the husband the office of trustee of the legal title. The slave was not employed by the husband in any manner inconsistent with the trust which the law cast upon him, or with the wife's title. The husband had no possession in opposition to the title of the wife, or distinguishable from possession by him as her husband, and under her title. Under such circumstances, the law refers the possession to the title, because the possession is where it ought to be, if it be under the title.—Joy v. Campbell, 1 Sch. & Lef. 328; De Graffenreid v. Thomas, 14 Ala. 681; Williams v. Maull, 20 Ala. 721.

6. Referring the possession to the title, Mrs. Varner, the donee, must be regarded as having been in possession from the date of the gift. The possession having, *bona fide*, remained with the donee, it was not necessary, under the statute of frauds, that the deed of gift should be acknowledged and proved in open court.

7. We regard the case of Gerald v. McKenzie, 27 Ala. 169, as settling the question of the complainant's right to maintain this bill. Her husband was her trustee only because the law cast upon him the office. He was not bound by any contract to protect the trust property. The slave which is the subject of suit had been sold under executions against the husband. Under such circumstances, the wife must be allowed at once to come into chancery. The defendant claims under the trustee, and sets up a title in the trustee, adverse to the complainant. In that particular, as well as in the fact that there is no trustee bound to execute the trust and protect the trust property, this case is distinguishable from that of Colburn v. Broughton, 9 Ala. 351.

The decree of the chancellor is affirmed.

PECK & RHODES *vs.* COLBY.

[SUMMARY PROCEEDING AGAINST CONSTABLE'S SURETIES.]

1. *Constable necessary party.*—The constable is a necessary party to a summary proceeding, under the act of 1824, (Clay's Digest, 219, § 87,) for failing to return an execution.
2. *Practice in appeal cases.*—In a case removed by appeal or *certiorari* from a justice's court, a new party cannot be brought in before the circuit court.

APPEAL from the Circuit Court of Barbour.
Tried before the Hon. S. D. HALE.

L. L. CATO, for appellants.
E. C. BULLOCK, *contra.*

WALKER, J.—The act of 1824, (Clay's Digest, 219, § 87,) under which this proceeding was instituted, authorizes the notice to be given to either the constable or his sureties; but the proceeding and judgment cannot be against the sureties alone, without the constable, as was decided in the cases of Orr v. Duval, 1 Ala. 262, and James v. Auld & Spear, 9 Ala. 462. The proceeding before the justice of the peace, in this case, seems to have been against the sureties alone; and judgment was rendered against them, without the constable. The constable was never in any way made or treated as a party. The appeal was by the sureties alone, and they were the only defendants in the circuit court.

After a case has been removed into the circuit court, by appeal or *certiorari*, there can be no change of parties, so as to bring in a new party who was not proceeded against before the justice, and who was no party to the appeal.—Wilson v. Collins, 9 Ala. 127.

From the views above expressed, it is clear that the plaintiffs were not entitled to a recovery, in the attitude in which the case was presented to the circuit court; and that they cannot, by any amendment, so improve the condition of their case as to authorize a recovery. Without

passing upon the correctness of the reason given by the court below for the general charge against the plaintiff's right of recovery, we must affirm the judgment.

JONES *vs.* TRAWICK'S ADM'R.

[TROVER FOR CONVERSION OF SLAVE.]

1. *Parol evidence not admissible, at law, to vary bill of sale.*—Where a bill of sale for a slave is, by the direction of the purchaser, executed by the vendor to a third person, and delivered to him, as a security for the repayment of the purchase-money advanced by him, the subsequent repayment of the money by the purchaser cannot, at law, divest the title out of such grantee. (RICE, C. J., *dissenting.*)

APPEAL from the Circuit Court of Marengo.
Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by the administrator of Ignatius Trawick, deceased, against Richard Jones, to recover damages for the conversion of a slave named Ned. The evidence adduced on the trial is thus stated in the bill of exceptions:

"It appeared that Trawick, whose administrator the plaintiff is, held possession of the slave in controversy, from about the 14th May, 1852, until his death; that the plaintiff, as his administrator, then claimed and took possession of the slave; and that the defendant, in the spring of 1854, took possession of the slave, without the consent of the plaintiff, and converted him to his own use. There was evidence tending to show, that the slave had belonged to Streeter & Cox, who, in May, 1852, bargained with said Trawick for him; that Trawick, with their consent, took the slave to his own house, but Streeter & Cox retained the title in themselves, and the bargain was not finally closed, nor the money paid for the slave, until the 14th

May, 1852, when the defendant, at the request of Trawick, paid Streeter & Cox the sum of $700; that Streeter & Cox thereupon, with the consent of Trawick, executed to defendant a bill of sale for said slave, a copy whereof is hereto appended as an exhibit; and that this was done to secure defendant in the sum of $700 so advanced for Trawick. Said bill of sale was proved and adduced in evidence by the defendant, and was in his possession and control; and there was no evidence that it had ever been delivered up to Trawick. The evidence tended to show, that this bill of sale was thus executed in order to secure the payment of said sum of money advanced by defendant for said Trawick, and that defendant took no other evidence of the debt. Evidence was introduced by the plaintiff, tending to show that, on the 1st January, 1853, defendant and said Trawick had a settlement of the matters of account between them, a copy of which, showing the account then stated between them, is hereto appended as an exhibit; that this settlement was made out by witness at the request of the defendant, and given to Trawick; and that the defendant said, that this settlement showed how matters stood between them. But it appeared that defendant still retained said bill of sale."

The bill of sale and statement above referred to, as the same are set out in the transcript, are as follows:

"Received of Richard Jones seven hundred dollars, in consideration of which I bargain and sell to him a negro boy named Ned, which negro I warrant to be sound, and also warrant the title. Witness our hands and seal, this 14th May, 1852." (Signed) "STREETER & COX."

"Mr. I. A. Trawick, in account with R. Jones:

1853.				
Jan'y 1.	To rent of Planters' Hotel in Demopolis, from 27th May, 1852, at $20 per month		$140 00	
" "	your note due 17th May, 1852	$350 00		
	interest on same to date...	16 33	366 33	

Jan'y 1.	To note for purchase of girl Sarah, dated and due 27th May, 1852.....	$1,000 00			
	interest on same to date...	46 66	–1046 66		
" "	cash paid insurance on "Planters Hotel," 3d July, 1852, by F. & R...	$31 00			
	interest on same to date	1 24	– 32 24		
" "	paid you in A. S. Cade's sight draft on W. C. Dickinson, in favor of Ed. Baptist, and passed by R. G. Rapier, for Sarah.....		500 00		
" "	your 8 notes, with interest.....		899 54		
				$2984	77
	Cr.				
"	By sale of girl Sarah, by R. G. Rapier...		1100 00		
	Balance due.....			$1884	77"

"Upon this evidence, the court charged the jury, that said stated account was *prima-facie* evidence of the settlement and payment of said sum of money advanced by defendant, and of the extinguishment of his title to the slave; and that the burden of proof lay on the defendant, to show that said sum of $700 advanced by him to Streeter & Cox was not included in said settlement."

This charge, to which the defendant excepted, is now assigned as error, with other matters which require no particular notice.

William M. Brooks, for appellant.

Lomax & Clarke, *contra.*

WALKER, J.—The charge given in this case can not be correct, unless the payment of the money, advanced by the appellant for the intestate of the appellee, would, *at law*, divest and transfer to the latter the title vested in the former by the conveyance to him. Jones, at the request of Trawick, advanced the purchase-money of a slave bought by the latter; and, at the request of Trawick, a

written conveyance of the slave was made to Jones by the vendor, for the security of the repayment of the purchase-money advanced by Jones. Jones' title, thus derived, could not be divested by the payment of the money advanced by him, unless a condition could be incorporated upon the bill of sale by proof of a cotemporaneous or antecedent parol agreement, in a suit at law; thus giving it the effect of a mortgage. It is now well settled, that an absolute conveyance may, in a court of equity, be shown to have been designed to operate as a mortgage; and will, upon proper proof, be treated as a mortgage in that court. But the chancery court, in treating an absolute conveyance as a mortgage, proceeds upon principles peculiar to itself. The jurisdiction of the chancery court to declare an absolute conveyance a mortgage, has often been assailed, as an infringement of the wholesome rule that a written contract can not be varied by parol evidence. It has been maintained, however, upon the ground that the court may, for the purpose of preventing the fraudulent use of a conveyance, interpose and enforce the parol trust upon which it was made.—Bishop v. Bishop, 13 Ala. 475; Kennedy v. Kennedy, 2 Ala. 571; Sledge v. Clopton, 6 Ala. 589; Parish v. Gates, 29 Ala. 254; Edmundson v. Welsh and Wife, 28 Ala. 578.

The jurisdiction of the court of equity rests upon grounds not recognized in a court of law. We have in this State no case, in which a court of law has assumed to enforce the parol trusts upon which a written conveyance was made; and there is no principle upon which the exercise of such power by a court of law can be upheld. The rule, that the written contract cannot be varied by parol evidence, is unbending at law; and the exceptions which prevail in a court of chancery are referrible to its peculiar jurisdiction over trusts, and for the prevention of frauds.

In the case of Sewall v. Henry, 9 Ala. 24, there was a cotemporaneous written instrument, which was construed to be a part of the same instrument with, and to provide a condition to the conveyance. In the old case of Harrison & Harrison v. Hicks, 1 Porter, 423, the conveyance was modified and altered into a mortgage, or pledge, by a

subsequent parol agrement. That case is maintainable, upon the principle that a written contract may be altered by a posterior parol agreement; and does not violate the rule, which prohibits the variation of a written instrument by parol evidence of a cotemporaneous or antecedent agreement.

There is a class of cases, in which parol proof is admissible, to show that there was a collateral agreement, cotemporaneous with the execution of a note, that the note might be discharged in a particular manner, provided the agreement has been executed. McNair and Wife v. Cooper, 4 Ala. 660; Murchie v. Cook & McNab, 1 Ala. 42; Honeycut v. Strother, 2 Ala. 135; Bradley v. Bentley, 8 Verm. 243; and Hagood v. Swords, 2 Bailey, 305, are all cases belonging to that class. They rest upon the idea, that when the parol agreement, as to the discharge of the note and its performance, has been proved, the note itself has not been varied, but the discharge of the note has merely been proved. The parol cotemporaneous agreement is admitted, not to vary the note, but to aid in the establishment of a subsequent satisfaction of it. This principle cannot apply here. To enable the administrator of Trawick to recover, it is necessary that he should not only show a discharge of the debt created by the advancement of money on the part of Jones, but that the bill of sale was subject to a parol condition, which, we have already decided, cannot be done in a court of law.

As this point is conclusive of the case, in a court of law, upon the facts before us, it is unnecessary to consider the other question argued at the bar.

The judgment of the court below is reversed, and the cause remanded.

RICE, C. J.—I dissent from the opinion of my brethren in this case. The bill of sale shows, that the legal title was conveyed to the grantee; but it does not show that it was not a part only of a more general agreement entered into at the time of its execution, nor that it was not to *become inoperative* on the payment of the sum of money specified in the verbal agreement made at the time

of its execution. Verbal evidence, that the bill of sale was part only of a more general agreement, and that by a verbal agreement made simultaneously with it, it was to *become inoperative* on the payment of a specified sum, does not oppose any thing in the bill of sale, but is consistent therewith. The proof of such agreement, without proof that it has actually been performed or executed, may be inadmissible, as a court of law will not give effect to it, so long as it is *executory*. But, when it has been *actually performed or executed*, verbal evidence of its terms, coupled with proof of *its actual performance or execution*, may be given in evidence in a court of law, in a suit like this, for the purpose of defeating the right asserted under the bill of sale.—3 Stark. on Ev. 1049; Deshazo v. Lewis, 5 Stew. & Por. 91; McNair v. Cooper, 4 Ala. Rep. 660.

FONTAINE *vs.* GUNTER.

[ASSUMPSIT ON BILL OF EXCHANGE, BY ENDORSEE AGAINST DRAWER.]

1. *Alteration of bill.*—The drawer, being indebted to the acceptors, signed his name to the first and second of a bill of exchange for the amount, using a printed form, and leaving in blank the date, time and place of payment, names of payee and drawees, and place of drawing; and sent it to the acceptors, to be negotiated by them, and the proceeds to be applied to the payment of his indebtedness. The acceptors filled up the blanks, and, by alterations, erasures, and mutilations, converted each part into an "only" bill, one of which they negotiated through an accommodation endorser in violation of the trust on which they received it; the alterations and erasures appearing on the face of each part. *Held*, that such accommodation endorser, having paid the bill, could not recover against the drawer, without proving that the alterations were made with his privity and consent.
2. *Error without injury.*—Where all the evidence is set out in the bill of exceptions, and shows that the plaintiff can never recover, the appellate court will not, at his instance, examine into the correctness of any of the rulings of the primary court.

APPEAL from the Circuit Court of Montgomery.
Tried before the Hon. E. W. PETTUS.

THIS action was brought by John Fontaine against Charles G. Gunter, and was founded on a bill of exchange for $2500, which purported to be drawn by the defendant on Fontaine & Dent, of Mobile, was dated Montgomery, January 23, 1851, payable twelve months after date, at the Bank of Mobile, and endorsed by J. Moore and Lewis McQueen. The only plea was the general issue.

The bill offered in evidence on the trial was as follows:

"Exch. for
$2500. *Montgomery, Jan'y 23d*, 1851.

Twelve months after date of this *only* of exchange, pay to the order of *J. Moore, at the Bank of Mobile*, twenty-five hundred dollars, value received, and charge the same to account.

"To *Fontaine & Dent*, "C. G. GUNTER."
Mobile, Ala.

It appeared on the trial, from evidence adduced by the defendant, that, being indebted to Fontaine & Dent in about the sum of $2500, the defendant signed his name to the first and second of a bill of exchange for that amount, and remitted the bill to said Fontaine & Dent, to be by them negotiated, and the proceeds to be applied in extinguishment of said debt. The bill used by the defendant was a printed form, to which he merely signed his name, and added the amount; leaving the second, which corresponded, *mutatis mutandis*, with the first, in the following form:

"Second of Exch. for
$2500. ———————————
——————————— after date of this second of exchange, (first unpaid,) pay to the order of ———————
———————, twenty-five hundred dollars, value received, and charge the same to account.

"C. G. GUNTER."

The defendant's signature, and the words and figures expressing the amount of the bill, were written; the

other parts of the bill printed. On the receipt of this bill, Fontaine & Dent, or one of them, separated the two parts, filled up the blanks, and, by erasures and alterations, converted each part into an "only" bill of exchange; so that the second part assumed the form above quoted.

In the first form, the italicized words represent the blanks which were filled up by Fontaine & Dent; the words "*first unpaid*" and "*second*," which appear in the printed form, were erased by lines drawn across them with a pen; the word "*only*" was inserted above the word "*second;*" and the words "*second of*" in the left-hand corner, preceding the words "Exch. for," were torn off. In this form, said Fontaine & Dent attempted to negotiate the two bills in Mobile; but, failing to do so, they informed defendant of the fact, and he thereupon remitted to them in money the amount of his indebtedness. It further appeared that Fontaine & Dent, after failing to negotiate the bills in Mobile, sent the second to the plaintiff, at Columbus, Georgia, who was there endorsing and negotiating bills for their accommodation; that plaintiff endorsed the bill, got it discounted, and remitted the proceeds to said Fontaine & Dent. Before the maturity of the bill, Fontaine & Dent became insolvent, and the firm was dissolved by the death of one of the partners. The bill was protested for non-payment, and was afterwards paid by plaintiff. The other part of the bill, which had never been negotiated, was returned to the defendant, by one of the clerks of Fontaine & Dent, after the insolvency and dissolution of the firm, and was produced by the defendant on the trial.

The defendant adduced in evidence, against the plaintiff's objection, several letters written to him by Fontaine & Dent, one acknowledging the receipt of the draft for $2,500, another informing him of the failure of their efforts to get it discounted in Mobile, and a third acknowledging the receipt of the money subsequently remitted by him in payment of his indebtedness; also, several letters written by plaintiff to said Fontaine & Dent, showing that plaintiff received said bill now sued on, under a promise to endorse and negotiate it for the benefit of

Fontaine & Dent, and that he so endorsed and negotiated it. To each of these letters the plaintiff objected, on the grounds of irrelevancy and illegality, and reserved exceptions to the overruling of his several objections.

The plaintiff offered to prove "the character and reputation of Fontaine & Dent for honesty and fair dealing," and, in that connection, "that an offer by them of a bill such as the one sued on was not calculated to excite suspicion against it;" but the court sustained objections to each portion of the evidence, and exceptions were reserved to its rulings. The plaintiff also offered to prove, "that it was customary among mercantile men, and according to mercantile usage, to change the *second* of a set into an *only* bill, in the manner of the one here sued on;" but the court refused to allow this to be done, and the plaintiff excepted. "The plaintiff further offered to prove, by a witness who was shown to be a banker and dealer in exchange and negotiable paper, that bills similar in appearance to that before the jury were frequently and commonly negotiated in the regular course of commercial business. The court refused to allow this, saying to the counsel, in the presence and hearing of the jury, that if a bill was altered in a material part, and the alteration appeared on the face of the bill, the effect was to render the bill void; that such alteration could not be explained, by evidence of custom among bankers and dealers in exchange; and that the effect of the alteration was not a question of fact, but a question of law purely. There was no exception to this remark, but the plaintiff excepted to the rejection of said evidence. The defendant's counsel then consented that the witness might speak of the matters embraced in the last offer, and the examination of the witness was had on that point; but the court did not qualify or withdraw the opinion expressed as to the alteration of the bill. The witness then testified, that bills similar to that before the jury were often and commonly used and offered in the course of business; that he had often sold and purchased such bills himself; but that no such alterations were ever made, after the bill had passed out of the hands of the drawer, without his con-

sent. The defendant also admitted, that the *second* of bills was often and commonly altered to an *only* bill in the course of business, but always at the time of drawing. The defendant proved, that when a bill was drawn in two parts, it was customary to accept the first only, and to write on the face of the second 'first accepted,' signing the initials of the acceptors."

This is the substance of the evidence, all of which is set out in the bill of exceptions; and thereupon the court charged the jury, in effect, that if they believed from the evidence that the bill was drawn, altered, endorsed and negotiated, as above stated, then the plaintiff could not recover. The plaintiff excepted to this charge, and requested the court to give several other charges, all of which the court refused, and which require no particular notice; exceptions being reserved by the plaintiff to the refusal of each.

The rulings of the court on the evidence, and in the instructions to the jury, are now assigned as error.

E. J. Fitzpatrick, and Martin, Baldwin & Sayre, for the appellant.—1. Gunter, in leaving the blanks as he did, gave Fontaine & Dent an implied authority to fill them up.—Montague v. Perkins, 22 English Law & Eq. R. 520; Herbert v. Huie, 1 Ala. 18; Roberts v. Adams, 6 Porter, 361. If the interlineations appeared to be in the same handwriting in which the blanks were filled, it would have seemed, to all persons not informed of the facts, to have been done by the same authority. These facts distinguish the case from those in which alterations have been made after the bill was complete. The law itself presumed the alteration, if in the same handwriting, to have been done before the bill was signed.—Beaman v. Russell, 20 Vermont, 205; Matthews v. Coalter, 9 Missouri, 696; North River Meadow Co. v. Shrewsbury Church, 2 New Jersey R. 424; 1 Greenl. Ev. (ed. of 1854,) § 564, and notes. The plaintiff, in taking the bill, ought not to be required to be more skeptical than the law itself. By leaving the blanks in the bill, Gunter enabled the drawees to occasion the loss; and therefore, as between

himself and the plaintiff, he must bear it.—Robertson v. Smith, 18 Ala. 227; Herbert v. Huie, 1 Ala. 18; Lickbarrow v. Mason, 2 Term R. 63.

2. The plaintiff is, on the evidence set out in the record, a *bona-fide* holder in due course of trade.—Kimbro v. Lytle, 10 Yerger, 417; Nichol v. Bate, 10 Yerger, 433; Bank of Mobile v. Hall, 6 Ala. 639; Barney v. Earle, 13 Ala. 102; Saltmarsh v. Tuthill, 13 Ala. 398; Chitty on Bills, 209–10. Being a *bona-fide* holder, without notice, he is not affected by any defenses existing between the drawer and acceptor.—Minell & Co. v. Reed, 26 Ala. 732.

3. The reputation of Fontaine & Dent for honesty and fair dealing, and the custom among mercantile men to change the first or second into an only bill, in the manner of the bill sued on, were relevant and material as evidence, in determining the question whether the bill was on its face suspicious.

4. The letters of Fontaine & Dent to Gunter, and of plaintiff to Fontaine & Dent, had no relevancy to the issue, and should have been excluded.

Wm. P. & T. G. Chilton, and Watts, Judge & Jackson, *contra*.—1. The alteration of the bill by Fontaine & Dent in the manner disclosed by the evidence, without the knowledge or consent of Gunter, rendered it wholly invalid as to him, as much so as if it had been forged; and this, although it might be in the hands of an innocent holder.—Chitty on Bills, 204–6; Chitty on Contracts, 667–9; Byles on Bills, 143; Master v. Miller, 4 Term R. 320; S. C., 2 H. Bla. 140; Cowie v. Halsall, 4 Barn. & Ald. 197.

2. But the plaintiff was not an innocent holder for value. He received the bill from the acceptors, by whom the alterations were made, and negotiated it for their benefit, and as their agent, if indeed he was not interested with them in the use made of its proceeds. Consequently, he can occupy no higher position than Fontaine & Dent. Moreover, the alterations and mutilations rendered the bill suspicious on its face; and this was sufficient to put him on inquiry, and thus charge him with implied

notice of the breach of trust committed by Fontaine & Dent.—Thompson v. Armstrong, 7 Ala. 256; Wallace v. Branch Bank at Mobile, 1 Ala. 565; Boyd v. Macon, 11 Ala. 822; Brewer v. Morgan, 13 Ala. 551; Chitty on Bills, 212.

3. Whether the bill was suspicious on its face, was a question of law; and the evidence of a custom among commercial men, thus to alter bills, was not admissible. Jewell v. Center & Co., 25 Ala. 498; Bouvier's Law Dictionary, tit. *Law merchant.*

4. The character of Fontaine & Dent was not a question in issue before the jury.

5. The letters read in evidence had each a material bearing on the case, and were immediately connected with the transactions out of which plaintiff deduces his right of recovery.

STONE, J.—It is settled in England, by a well-considered and uniform current of decisions, that any alteration of a bill of exchange, in a material part, by which the liability of the parties to be charged is increased, avoids the instrument, unless it be shown that such alteration was assented to by those parties whose liability is thereby increased. Further, that if a bill of exchange appear on its face to have been so altered, the *onus* rests on the person asserting rights under it, of showing that the alteration was made before the bill was executed, or that it was assented to by the parties to be bound thereby.—Johnson v. Duke of Marlborough, 2 Stark. 313; Henman v. Dickinson, 5 Bing. 183; Bishop v. Chambre, 3 Car. & P. 53; McMicken v. Beauchamp, 2 Miller's La. Rep. 290; Knight v. Clements, 8 Ad. & El. 215; Addison on Contracts, 1085; Bailey on Bills, 98–9; Chitty on Contracts, 679; Livingston v. Butler, 2 B. & P. 283.

There are some American decisions, which conflict with this principle, and hold that a mere alteration or erasure of a bill of exchange, without more, does not cast on the plaintiff the *onus* of explaining such alteration.—President and Directors of Cumberland Bank v. Hall, 1 Halst. 215; Rankin v. Blackwell, 2 Johns. Cas. 198. This last

case was materially shaken, if not entirely overruled by Jackson v. Osborn, 2 Wend. 555.

Messrs. Cowen & Hill, in their notes to Phillips on Evidence, say, "It is agreed by all the cases, that when the alteration appears to be suspicious on its face, and is not duly noted; as if the paper have been cut close, or a mutilated figure be left, or the ink differ, or the handwriting be that of a holder interested in the alteration, &c., the *onus* lies with the party who claims that the alteration was genuine."—See edition by Van Cott, part 1, 462, and authorities cited; Thompson v. Armstrong, 7 Ala. 256.

Without determining, at this time, whether we will adhere to the English rule as above declared, there can be no question of the correctness of the rule last above stated. Let us submit the bill of exchange sued on in this case to this test. There is no controversy as to the condition and appearance of this bill, when it was received by the plaintiff. Its face is daguerreotyped in the bill of exceptions, as nearly as it was possible to do so. We may then assume this appearance to be one of the uncontroverted facts on the trial below. The upper left-hand corner of the bill was torn off, carrying with it the word *second*, as preceding the words, "*Exch. for.*" The printed word "second," in the body of the bill, had black lines drawn through it, and the word "only" written over it. The printed words "first unpaid," had also black lines drawn through them. These alterations and erasures rendered the bill suspicious on its face, They were well calculated to put the plaintiff on inquiry; and failing to give heed to these monitions, we think he cannot claim to be a *bona-fide* holder without notice.

The consideration of this bill being thus opened to the defendant, there can be no question that the sale of this bill, under the circumstances disclosed in the record, was a gross violation of trust and confidence. In fact, the abuse of trust is also one of the uncontroverted facts of this case. The plaintiff, as to his legal rights, stands to this transaction in a position no more defensible than Fontaine & Dent would occupy, if they were suing upon

it.—Saltmarsh v. Tuthill, 13 Ala. 390; Saltmash v. P. & M. Bank, 14 Ala. 668.

From the principles above stated, it is clear that the plaintiff in this case cannot recover, unless he proves that the erasures and alterations of the bill were made with the privity and consent of the defendant. The bill of exceptions sets out all the evidence, and it is equally clear that no such proof can be made. In fact, there is not a shadow of pretense that Fontaine & Dent, or either of them, had authority to make the alterations. Under these circumstances, it is manifest the plaintiff never can recover.

We will not inquire whether the circuit court did or did not err in the various rulings on the introduction of evidence, and in the various charges excepted to. If in any of them there was error, it was error without injury. See Dunlap v. Robinson, 28 Ala. 100; Saltonstall v. Doe *d.* Riley, *ib.* 164, and authorities cited.

There is no error in the record available to plaintiff, and the judgment of the circuit court is affirmed.

Rice, C. J., not sitting.

McLEMORE *vs.* PINKSTON.

[BILL IN EQUITY FOR FORECLOSURE OF MORTGAGE.]

1. *Discharge of mortgage.*—If the assignee of a mortgage invests in its purchase money furnished to him by the mortgagor, the mortgage is, *pro tanto*, discharged; and when such assignee seeks a foreclosure, the mortgagor is entitled to a credit for the money thus advanced by him.
2. *Admissibility of wife's declarations.*—The declarations of the wife, made contemporaneously with the delivery of money to another person, to the effect that it was her separate property and did not belong to her husband, are admissible evidence as a part of the *res gestæ; secus*, as to her declarations, made at the same time, to the effect that the money was the proceeds of her own labor, under an agreement with her husband that she might retain it as her own.
3. *Separate estate of wife in proceeds of her own labor.*—Although the husband

may, by an irrevocable gift to a trustee, or by some other clear and distinct act, create a separate estate for his wife in the proceeds of her own labor; yet the declarations of the wife, contemporaneous with the delivery of money to another person, are not, of themselves, sufficient to establish such separate estate, as between the person to whom the money was delivered and a purchaser at execution sale against the husband.

APPEAL from the Chancery Court of Montgomery.
Heard before the Hon. WADE KEYES.

THE bill in this case was filed by Moses McLemore, the appellant, and sought to foreclose a mortgage on several slaves, which was executed by James K. Pinkston on the 19th May, 1845, and the law-day of which was the 1st January, 1846. The mortgage was given to Graham & Rogers, to secure the payment of a promissory note for $1000; and was assigned by them, for valuable consideration, on the 20th March, 1847, to Solomon Thompson, whose administrator, on the 12th February, 1849, assigned the same, for valuable consideration, to McLemore. The slaves remained in the possession of the mortgagor until May, 1849, when they were seized and sold under execution against him.

The mortgagor and the several purchasers of the slaves at sheriff's sale were made defendants to the bill. A decree *pro confesso* was entered against Pinkston, the mortgagor. The other defendants answered; alleging that the money, with which the plaintiff purchased the mortgage, was furnished to him by Pinkston, through his wife; and that the transaction was intended to place the slaves out of the reach of Pinkston's creditors.

The proof adduced consisted of McLemore's answers to interrogatories propounded to him, in a suit at law brought in the name of Graham & Rogers, for his use, against the sheriff who levied on the slaves; and which were read in evidence by consent, "subject to all legal objections." In these answers the respondent stated, that he bought the note and mortgage for himself, and not at the instance of Pinkston or his wife; that he paid a portion of the purchase-money out of his own funds, and the balance (amounting to $1040) with money placed in his hands by

Mrs. Pinkston to indemnify him, according to her previous promise, for property purchased by him for her at a mortgage sale of some of her husband's property; that the money thus placed in his hands by Mrs. Pinkston consisted of silver coin and bank-bills of small denominations; that Pinkston was not present when the money was delivered; and that Mrs. Pinkston said, at the time of its delivery, that it belonged to her, and not to her husband,—that she had made it by her own labor, under an agreement with her husband that she might retain as her own all the money she could make by her garden and poultry. It was admitted, that the plaintiff, after paying the bills of exchange given for the property purchased at the mortgage sale, had sued the acceptor, and had recovered a judgment, which had been satisfied.

On final hearing, on pleadings and proof, the chancellor held, that the mortgagor was entitled to a credit for the money advanced by Mrs. Pinkston to the complainant; but ordered a foreclosure as to the balance paid by complainant for the mortgage. The complainant appeals from this decree, and assigns as error the allowance of the credits to the mortgagor.

THOS. WILLIAMS, for the appellant.

WATTS, JUDGE & JACKSON, *contra.*

WALKER, J.—The decree of the chancellor in this case contains no error of which the appellant can complain. The appellant bought the mortgage which he seeks to foreclose, and used in the purchase the sum of one thousand and forty dollars of money placed in his hands by the wife of the mortgagor. If this money was the money of the mortgagor, it can not be doubted that the mortgage was discharged, *pro tanto.* McLemore would be deemed a trustee for the mortgagor, for the money of the latter placed in his hands, and would be precluded from a foreclosure, to that extent. He could not be permitted, after the expiration of several years from the appropriation of the money, to say that it was placed in his hands to hold as an indemnity, when he has

reimbursed himself, by a recovery from another, for the loss against which the money was designed as an indemnity; and when it does not appear that either the mortgagor or his wife had ever objected to the appropriation made by him.

2. The views above expressed dispose of all the questions in this case, except the question whether the money which the mortgagor's wife placed in the hands of the appellant was the money of the mortgagor. The proof relied upon for the complainant, to show that the money was the separate estate of the mortgagor's wife, was, that a large portion of the money consisted of bills of a small denomination, and coin in small pieces, such as would likely be received from the sale of small articles in a city market; and that she declared that the money was not her husband's—that her husband had agreed that she might have all she could make from her garden and her poultry, and that the money handed to the appellant was derived from these sources. These declarations were legitimate evidence, only so far as they qualified and explained the act done; or, in other words, only so far as they came within the doctrine of *res gestæ*. So far as they asserted that the mortgagor's wife claimed the money as her own, and asserted her separate right to the money, the declarations may be considered. But so far as they constitute a statement of a contract with her husband, and a narrative of the past circumstances by which she procured the money, they were not admissible evidence; and, although brought before the court because they were recited in the answers to interrogatories by the plaintiff, which were given in evidence by the defendants, and although it may therefore have been proper for the court to have looked to it as evidence; yet we deem it altogether insufficient to prove the separate estate of the wife in the money.

3. While it is unquestionably the law, that the husband may give to the wife her earnings, and constitute them a separate estate in her, it is also clearly laid down by the law-books, that such an estate could only be created by a clear irrevocable gift to some person as a trustee, or by

some clear and distinct act of the husband; and that mere declarations of intention on the part of the husband can never constitute such an estate.—2 Brighton Husband and Wife, 202, 204; McLean v. Longlands, 5 Vesey, 79. The wife's earnings belong, *prima facie*, to her husband. Conceding that the money delivered to the appellant was the fruit of her earnings, the law intends, till the contrary is shown, that they are her husband's property. There is not the slightest evidence, aside from the declarations of the wife, that those earnings had been given up to her by her husband as a separate estate. If there was any other evidence attainable—if there existed other proof of a contract between the husband and wife as to her earnings; or if the wife had a separate estate, or any other source from which she might have derived the fund; or if the husband had for a long time recognized his wife's separate estate in her earnings, there ought to have been proof of those facts. There is nothing in this record from which we are authorized to infer their existence. The wife's declarations, standing alone and unsupported, are not, in our judgment, sufficient to establish a separate estate in the money, or to show that she was authorized to carry on any business on her own account.

The decree of the court below is affirmed.

Ex Parte REMSON.

[APPLICATION FOR MANDAMUS TO STRIKE CAUSE FROM DOCKET ON ACCOUNT OF DISCONTINUANCE.]

1. *What amounts to discontinuance.*—Under a conditional order for a change of venue, by consent of parties, to either one of two specified counties at the plaintiff's election; which order was never completed by the action of the court, after the plaintiff had made his election, in directing the papers of the cause to be transmitted by the clerk to the county chosen,—the fact that the plaintiff endeavored for several years to have the cause entered on the docket of the court in one of the counties named in the order, but without success, and during that time took no steps relative to the cause in

the court in which it was first pending, does not amount to a discontinuance, when it is not shown that the file of papers was ever removed from the first court.

APPLICATION for a *mandamus* to the circuit court of Talladega, Hon. C. W. RAPIER presiding, to compel that court to strike from its docket a cause therein pending, wherein Ezekiel McCravey is plaintiff, and David H. Remson defendant, on the ground that said cause has been discontinued. It appears from the facts stated in the bill of exceptions, which is incorporated in the transcript exhibited with the motion, that said suit was originally brought in the circuit court of Talladega; that an order was therein made, at the spring term of said court, 1852, granting a change of venue on the plaintiff's application, and reciting that, "by consent of parties made in open court, it is agreed that the cause shall go either to Benton or St. Clair county, at the election of the plaintiff;" that the cause was entered by the clerk on the docket of St. Clair circuit court, at the September term, 1852, against the objection of the defendant, who, at the succeeding term, moved the court to strike it from the docket; that the court overruled the motion, and decided that the cause was properly in that court; that the defendant made application to this court, on the facts above stated, for a *mandamus* to the St. Clair court, commanding it to strike said cause from its docket; that this court held said order for a change of venue incomplete, (as shown by the report of the case in 23 Ala. 25,) and granted a rule *nisi* for a *mandamus;* that the cause was stricken from the docket of the St. Clair court, at its spring term, 1856, and, at the next ensuing term, on motion of the plaintiff, was reinstated on the docket of the Talladega court, where no order had been taken from the time when said change of venue was granted; and that the defendant resisted the motion to reinstate the cause, and excepted to the ruling of the court in allowing it.

MORGAN & MARTIN, for the motion.
WHITE & PARSONS, *contra.*

STONE, J.—The following two legal propositions seem to be clearly settled:

1. That if, by the action of the plaintiff, with the concurrence or assent of the court, a case be taken from the docket, by an order which is valid until reversed; and such case be permitted to remain off the docket for a term or more, without any action had in the case, the cause is thereby discontinued, unless such order be in fact subsequently reversed.—Griffin v. Osbourne, 20 Ala. 594; Drinkard v. The State, *ib.* 9.

2. The mere fact that the clerk, for a number of terms, has failed or neglected to docket a cause, will not have that effect, even though no order was made in the cause at any of said several terms.—Harrall v. The State, 26 Ala. 52; McGuire v. Hays, 6 Humph. 419; Wiswall v. Glidden, 4 Ala. 357; Smith v. Pearson, 24 Ala. 354; Gilbert v. Hardwick, 11 Geo. 599; Moreland v. Pelham, 2 Eng. (Ark.) 338, 341; Price v. Bank of Tennessee, 1 Swan, 265.

Another principle has also been settled in this court, which, it is contended, bears on this case; namely, that when a case goes off the docket, by an order and judgment final and regular on its face, but which by reason of some extrinsic fact is void, such judgment may, on the establishment of the extrinsic fact, be declared void by the court which rendered it; and when the judgment is in this way set aside and avoided, it has the effect of reinstating the case upon the docket.—Moore v. Easley, 18 Ala. 619, and authorities cited. I do not think this last principle bears on the case under consideration.

It is argued for the petitioner in this case, that the bill of exceptions, and the report of the case (*Ex parte* Remson) in 23d Ala. 25, which is made a part of the bill of exceptions, show that this case was taken from the docket of the Talladega circuit court, by the act of the plaintiff; and that from the persevering effort of the plaintiff to have it placed and retained on the docket of the St. Clair circuit court, this court must presume that the file of papers in the cause was taken from the Talladega court, and lodged in the St. Clair court. From these assumed

premises the inference is drawn, that this case has been discontinued in the Talladega circuit court, by the act of the plaintiff.

I will not now announce what would be my decision on this application, if it were shown that the plaintiff had, by his own act, removed the papers, or caused them to be removed, from the Talladega circuit court, with a view to place them in the St. Clair court. Whether such interference would be set down as the cause and excuse for the clerk's failure to docket the cause afterwards, and for the omission of all notice of the case in the proceedings of the court, is a question not raised by this record.—See Comstock v. Givens, 6 Ala. 95. The record in this case is silent on the question of the custody of the original file of papers, between the making of the imperfect order, in 1852, and the motion to reinstate the case in 1856. In such case, what presumptions must be indulged in reference to their custody? The rule is well settled, that in the absence of proof to the contrary, the presumption is, that sworn officers have done their duty.—See Ward v. The State, 28 Ala. 53, and authorities cited. Clerks are sworn officers. The order made in this case by the circuit court of Talladega, under which it was once contended the venue was changed, was void.—See *Ex parte* Remson, 23 Ala. 25. That order, being void, had no effect whatever on the case in the Talladega circuit court. The legal presumption above stated makes it my duty to hold, in the absence of proof to the contrary, that the clerk did his duty, and retained the papers.

It is urged, however, that for four years, the plaintiff made continual efforts to establish this case on the docket of the St. Clair circuit court. I do not think this is enough to show, either that the plaintiff had directed the case to be taken from the Talladega docket, or that he had removed the file of papers. All that is shown to have been done may be true, and yet the clerk of the Talladega circuit court may have done his duty, and retained the papers.

The order for removal being void, the case stands in law precisely as if no such order had ever been made.

This leaves the application unsupported, save by the two facts—1st, that for four years the case was not docketed, or any notice taken of it, in the Talladega circuit court; 2d, during all that time, the plaintiff was making continuous efforts to establish the case on the St. Clair docket. I do not think these two facts take this case out of the operation of the principle numbered 2, as stated in the opening of this opinion.

Mandamus refused.

RICE, C. J., and WALKER, J., not sitting.

SCRUGGS *vs.* DRIVER'S EXECUTORS.

[BILL IN EQUITY FOR RESCISSION OF CONTRACT.

1. *Revocation of agency by death.*—An agent's authority, under a written power of attorney, to make a contract for the sale of his principal's distributive interest in an unsettled estate, is revoked by the death of the principal before the completion of the contract.
2. *Authority of one of several co-executors.*—One of two joint executors cannot, without the concurrence of his co-executor, create a pecuniary liability against their testator's estate, by a contract for the purchase of property; nor are the admissions of one executor sufficient to establish such contract as against the estate.
3. *Rescission of contract on ground of mistake.*—A contract of sale, made by an agent after the revocation of his authority by the death of his principal, will be rescinded in equity, at the instance of the purchaser, when both parties acted in ignorance of the principal's death.
4. *Cancellation of notes for purchase-money.*—In rescinding a contract, at the instance of the purchasers, who acted in their representative character as executors, on account of a mutual mistake of fact which rendered it void, a court of equity will order the cancellation of the negotiable notes given for the purchase-money, notwithstanding there is a complete defense at law against them.
5. *Extent of relief in equity.*—On bill filed by a purchaser, for the rescission of a contract on the ground of mistake, and the cancellation of the outstanding notes given for purchase-money, the jurisdiction of equity having once attached, the court will go on and do complete justice between the parties, although there is an adequate remedy at law to recover a portion of the purchase-money already paid.

6. *Jurisdiction of equity over foreign executors.*—Where foreign executors file a bill in the chancery courts of this State, against the personal representative of their testator's widow, asking the rescission, on the ground of mistake, of a contract by which they purchased the widow's interest in their testator's estate; and it appears that, although the widow never received her full distributive share of the estate, there is no danger of loss to the defendant if remitted to the foreign jurisdiction for its recovery, and that there are no assets of the estate in this State,—the court will not entertain a cross bill to compel the plaintiffs to account for such distributive share.

APPEAL from the Chancery Court of Madison.
Heard before the Hon. JOHN FOSTER.

THE bill in this case was filed by Giles L. Driver and William R. Hunt, executors of the last will and testament of Eli M. Driver, deceased, against James H. Scruggs, as executor of the last will and testament of Mrs. Julia S. Driver, who was the widow of said E. M. Driver; and sought the rescission of a contract, by which plaintiffs purchased from said Scruggs, acting as the agent of Mrs. Driver, her dower and distributive interest in the estate of her deceased husband, the recovery of that portion of the purchase-money which had been already paid, and the cancellation of the unpaid notes which had been given for the residue. It alleged, that said E. M. Driver died, at his residence in Shelby county, Tennessee, in October, 1851, leaving real and personal estate in the States of Tennessee and Mississippi; that his will was duly admitted to probate in Tennessee and Mississippi, and letters testamentary granted to complainants, who qualified and accepted the trust; that the widow dissented from the will, and claimed her dower and distributive share of the estate; that on the 10th February, 1853, before the widow's dower and distributive share of the estate had been allotted to her, said James H. Scruggs, acting as her agent and attorney in fact, entered into a written contract with complainants, by which, in consideration of the sum of $27,066, he sold and transferred to them her dower and distributive interest in said estate; that the purchase-money was paid, or secured to be paid, partly in certain slaves, a carriage and horses, and household furniture, partly in a bill of exchange on New Orleans, and the

residue in two promissory notes; that the slaves and other property were delivered, the bill of exchange negotiated, and the two promissory notes executed and delivered, in pursuance of the contract; that this contract was made in Memphis, Tennessee; that Mrs. Driver, at the time it was entered into, was in fact dead, having departed this life on the 9th February, 1853, in Florida; that her death was then unknown to both parties, and the contract was entered into by them under the belief that she was still living. The prayer of the bill was, that the contract might be rescinded, and the promissory notes canceled; that the defendant might be required to refund the money received on the bill of exchange, to deliver up the property received under the contract, and to account for the hire of the slaves; and the general prayer, for other and further relief, was added.

The defendant filed an answer to the bill; admitting the death of E. M. Driver, the probate of his will, and the widow's dissent therefrom, as alleged in the bill; admitting, also, the death of Mrs. Driver, (but not that she died on the day stated in the bill, of which fact proof was required,) and that defendant was her executor; admitting, also, that Mrs. Driver's dower in the lands of her deceased husband had never been allotted to her, but alleging that her distributive share of the personal property in Mississippi had been assigned to her, by commissioners appointed by the probate court, before her death. In reference to the contract set out in the bill, the answer admitted that the writings were signed on the 10th February, but averred that the contract was made and completed before that day; that during the first week of January, 1853, defendant, as the agent of Mrs. Driver, sold to complainants her dower interest in her husband's estate, for $5,000, and her distributive share of the personalty at valuation; that pursuant to this contract, commissioners were appointed by the probate court in Mississippi, who allotted to Mrs. Driver, as her distributive share of her husband's estate, certain slaves and a sum of money; that the personal property in Tennessee was carried by complainants to Mississippi, in order that it might be

included in the valuation there made, and was included in the estimate made by the commissioners; that the action of the commissioners was reported to the probate court, and was in all things confirmed; that the parties then went to Memphis, to ascertain the debts due to the estate, and Mrs. Driver's portion thereof, which they there ascertained; and that all this was done prior to the 10th February, 1853, when the notes and other writings were executed. The answer further alleged, that the cotton crop of 1852, and certain railroad stock held by said Driver, were not included in the valuation of personal property made by the commissioners as aforesaid; and that neither Mrs. Driver, nor the defendant as her executor, had ever received any portion thereof. It was prayed that the answer might be taken as a cross bill; that, if the writings should be set aside, the parol contract might be specifically enforced; or that the complainants might be compelled to account for and deliver Mrs. Driver's distributive share of the estate, deducting the value of the property received by the defendant. The answer also contained a demurrer to the bill, for want of equity, and because complainants had an adequate remedy at law.

The chancellor overruled the demurrer, and, on final hearing, rendered a decree for the complainants; ordering the rescission of the contract, the cancellation of the notes, and the refunding of the $5,000 received on the bill of exchange; but allowing the defendant to retain, not under the contract, but under the decree of the probate court of Mississippi, the property specifically allotted to Mrs. Driver by the commissioners.

The decree of the chancellor is now assigned as error.

Robinson & Jones for the appellant, made these points:

1. Taking all the allegations of the bill to be true, the complainants have a clear and undisputed right to recover back, by action at law, the money paid on the bill; and when this clear legal right is shown, equity will not afford relief.—Huey v. McElroy, 5 Porter, 165; Bibb v. McKinley, 9 Porter, 649; Chandler v. Faulkner, 5 Ala. 567; Crayton v. Johnson, 27 Ala. 506.

2. The bill does not make out such a case as will justify the cancellation of the notes. It does not charge that the notes are negotiable, and, therefore, liable to abuse; nor that the defense at law is at all difficult or uncertain; nor that a discovery is necessary in aid of that defense. But, on the contrary, it admits that the complainants got possession of Mrs. Driver's share of her husband's estate under their purchase, that they still hold it, and are in no danger of losing it. A purchaser certainly cannot, in equity, have his note for the purchase-money canceled, and yet hold on to the property for which it was given.—Willard's Equity, 302; 3 Vesey, 368; 5 Vesey, 286; 10 Paige, 340. The jurisdiction of equity to cancel securities is one of its extraordinary powers, and is only exercised when shown to be just, expedient, and highly proper. The court has a discretionary power in such cases. The question is, not what the court *must* do, but what it *may* do. It requires a clearer and stronger case to induce the court to order a cancellation, than to grant a specific performance.—Hamilton v. Cummings, 1 Johns. Ch. 523; Piersoll v. Elliott, 6 Peters, 98; 3 Cowen, 445.

3. Admitting the sufficiency of the allegations of the bill, are they sustained by the proof? The main fact, on which the whole equity of the bill depends, is the death of Mrs. Driver on the 9th February. The deposition of Mrs. Scruggs, which was taken to prove this fact, leaves it uncertain whether she died on the 9th or 10th of February. As her death took place in Florida, when the defendant was in Tennessee or Mississippi, the answer, even if considered evasive, cannot be treated as an admission of the fact charged.—Savage v. Benham, 17 Ala. 132. The defendant's statement to the witness Thompson, that Mrs. Driver died on the 9th February, is not shown to have been made after he had qualified as her executor; consequently, it cannot be received to affect the interests of her estate. Moreover, it is evident that he spoke from rumor merely, and not from personal knowledge; amounting to no more than this, that he had heard she died on the 9th. The proof, then, leaving it doubtful whether the death occurred on the 9th or 10th, is insufficient to

authorize a cancellation of the notes.—Aday v. Echols, 18 Ala. 355; 2 Story's Equity, § 764.

4. If the action of the chancellor in canceling the notes can be sustained, was he right in ordering the repayment of the $5,000 paid on the bill given for the right of dower? If the defendant's authority was determined by the death of his principal on the 9th February, the subsequent acts and admissions of the parties can have no effect on the rights and contracts then existing; and the other proof must be looked to, in ascertaining the state of things then existing. Hunt, in his letter dated on the 4th February, says, "We have bought Mrs. Driver's right to dower in the lands, for $5,000. We have just concluded a division of the estate. Mrs. D.'s share amounts to $20,000." The proof shows that, in using the word "*we*," Hunt referred to himself and Driver; and that Driver afterwards ratified his acts. This ratification binds Driver as firmly as though he had originally given Hunt authority to act, and may be shown by the same kind of testimony.—Reynolds v. Dothard, 11 Ala. 531; Clealand v. Walker, 11 Ala. 1058; Wood v. McCain, 7 Ala. 800. This establishes the position, that Hunt and Driver, as executors, bought the right of dower; and if any written memorandum was required, this letter was sufficient, to take the case out of the statute of frauds.—2 Phil. Ev. (Cowen & Hill's Notes,) 84, 85; Sugden on Vendors, (7th ed.) 84; 3 Atk. 503; 6 East, 507; 9 Vesey, 351; 1 Humph. 325.

5. No written memorandum was necessary to the validity of the contract for the purchase of the dower-right. The words of the Tennessee and Mississippi statutes of fraud only prohibit parol sales of "lands, tenements, and hereditaments." A right to dower is neither lands, tenements, nor hereditaments. Before assignment, it is neither an estate, nor an interest in lands; but a mere right to have something done—a chose in action merely. 4 Kent's Com. 61, 62; 7 Johns. 246; 17 Johns. 168; 6 Ala. 874; 19 Ala. 372; 18 Ala. 813; 1 Sm. & Mar. Ch. 474. A widow may bar her right to dower by acts which have never been held to pass an estate in lands; and if it may be thus barred, why may it not be released by parol?

5 Monroe, 518; 6 Johns. Ch. 195, 200, and cases cited. Suppose Mrs. Driver was now applying for her dower, and it was made to appear that she had entered into, and partly executed by the receipt of the money, the contract here proved; would it not be a good bar in equity, if not at law?

6. The bill is filed against Scruggs as executor of Mrs. Driver. To establish their case, the complainants must show a liability created by the testatrix herself in her lifetime, and cannot make her estate responsible for an act done by Scruggs after her death.

7. The complainants sue as executors of Driver, and ask relief in reference to a contract made by them, as such executors, under a power in the will, for the benefit of the estate. To allow them now to treat either demand as their individual property, would render the bill multifarious.—1 Dan. Ch. Pr. 397, and cases cited in note.

8. If the allegations of the bill be true, Driver's legatees might refuse to allow these executors a credit for the $5,000 paid by them; and being guilty of a *devastavit*, they cannot recover the money.—Pistole v. Street, 5 Porter, 70; Hopper v. Steele, 18 Ala. 828; Swink's Adm'r v. Snodgrass, 17 Ala. 653.

9. If the chancellor's decree on the points above discussed should be sustained, then the question comes up, whether the court will not impose some terms on the complainants. It is an old maxim, that he who seeks equity, must first do equity; and if there is anything that good conscience requires the plaintiff to do for the defendant, the court will compel him to do it.—2 Story's Equity, § 709; 5 How. (U. S.) R. 192; 1 Strobh. 356; 7 B. Monroe, 571; 1 Johns. Ch. 367; 5 Johns. Ch. 122. In this case, the whole of Mrs. Driver's share of her husband's estate, except the specified personal property allotted to her, passed to, and vested in Hunt and Driver.—3 Humph. 542; 3 Yerger, 281; 3 Ala. 679; 18 Ala. 648. Hunt and Driver, then, have taken the whole of her distributive share, and can hold it against any claim she may hereafter make. They have got all they contracted for, and still hold it. They owe her a debt, which was evidenced by

the notes ordered to be canceled. If the notes are canceled, the appellees ought to be required to pay the debt evidenced by them. The condition in which the parties are thus left, shows the error of the decree. The appellees get all they ask, and the appellant is left without remedy. If he sues for the purchase-money, he is met by this decree declaring the sale void. If he seeks an allotment of the distributive share of his testatrix before the probate court, he is met by the former decree of that court, sustaining and sanctioning the allotment already made. The chancellor allowed him to keep the negroes, because the probate court had allotted them; but required him to refund the money which had been allotted to him by the same decree. The decree of the probate court was a unit, and, if a part of it be good, the whole must stand until reversed. The court had jurisdiction of the property, and of the persons before it; and its action cannot be thus set aside for mere errors or irregularities.—Campbell v. Wyman, 6 Porter, 219; Robinson v. Campbell, 6 Porter, 269; McCartney v. Calhoun, 11 Ala. 117; 8 B. Monroe, 112; 1 How. (Miss.) R. 450. Moreover, the parties consented that money might be allotted instead of property; and that gave the court jurisdiction, if it had it not before.

10. The ruling of all the foregoing points against the appellant will make it necessary to consider the case made by his cross bill, in which he sets up an executed contract, except the reduction to writing, and asks its specific performance. That it is competent for him to do this, see Story's Eq. Pl. §§ 317, 399; Goodwin v. McGehee, 15 Ala. 232; Nelson v. Dunn, 15 Ala. 91. That the contract is proved, as to Hunt, is not denied; and Driver's connection with it is established by the proof, already referred to, showing that Hunt acted for him, and that he ratified Hunt's acts. For the power of the court to enforce a specific performance of such a contract, see 3 Atk. 384; Willard's Equity, 273–79; 1 Sim. & Stu. 607; 2 Barb. S. C. 608; 1 How. (U. S.) R. 304; 1 Wheaton, 152.

11. If the proof should be held insufficient to authorize a decree for the specific performance of the contract, the

cross bill must be sustained for the purpose of compelling the plaintiffs to deliver the residue of Mrs. Driver's distributive share of her husband's estate, which the proof shows she did not receive. In doing this, the court is asked, not to take jurisdiction over Driver's property in Mississippi, but to act *in personam*. The answer filed to the cross bill was a submission to the jurisdiction of the court, and it had power to compel the delivery of any property in the possession of the parties.—1 Barb. Ch. Pr. 77; Stapler v. Hurt, 16 Ala. 799; Harrison v. Mock, 10 Ala. 196. That the property is not in this State, is no objection to the relief prayed against the parties who have it in their possession, and who are before the court. Leading Cases in Equity, vol. 2, part II, 312, and cases cited; 2 Story's Equity, §§ 743, 733; Story's Equity Pleadings, § 489.

12. If all the foregoing points should, by possibility, be decided against the appellant, then it is submitted that the court should, at least, so modify the chancellor's decree as to enjoin the appellees from setting up the distribution heretofore made in bar of any future proceedings for the balance of Mrs. Driver's distributive share.

Walker, Cabaniss & Brickell, *contra*.—1. The contract for the sale of Mrs. Driver's dower was not reduced to writing until after her death, and the prior parol agreements were within the statute of frauds. It is doubtful, whether a letter to a third person can, under any circumstances, take a case out of the statute of frauds.—Roberts on Frauds, 106; 2 P. Wms. 64. But, admitting that such a letter may sometimes be sufficient, Hunt's letter in this case is, under all the authorities, insufficient in several particulars. The subject-matter of the sale is imperfectly described, and the parties are not designated with sufficient certainty.—Story on Contracts, § 785; 3 Johns. 399; 7 Porter, 73; 5 Barn. & Cres. 583; 2 Kent's Com. 661; 2 Greenl. Cruise, 51–55; 1 Sugden on Vendors, 118, note 2; 2 Sup. U. S. Digest, p. 59, §§ 706, 708, 712, 725–6; 3 Atk. 563; 1 Atk. 12; 11 Vesey, 550; 2 P. Wms. 64; 9 Mod. 3; 2 Mees. & W. 653. Nor is the

letter signed by the parties to be charged. The executors were the parties to be charged; while the letter is signed by one of them only, and in his individual capacity. A power to executors must be executed by all who qualify. 1 Sugden on Powers, 222; 1 Lomax on Ex'rs, 357, 362; 4 Monroe, 580; 4 Hen. & Mun. 444; 6 Paige, 52. The executors are made trustees by the will, and it was necessary for all to join in any disposition of the trust property. Hill on Trustees, 305; 8 Cowen, 544; 11 Barb. 527; 6 Barr, 267; 5 Wend. 558. It is clear, moreover, that the money was not paid on the original parol agreement, nor upon this letter of Hunt's, but upon the written contract which was signed on the 10th February. The money was not paid until after the deed was executed, when there was no parol agreement in existence on which it could have been paid, for the agreements were merged in the deed.—10 Ala. 548; 1 John. Ch. 273; Smith on Contracts, 77, 82; 8 Johns. 506; 10 John. 299. Mrs. Driver being dead when the deed was executed, the contract of sale was invalid, the thing intended to be sold having no existence.—2 Kent, 694; 11 Peters, 63; 1 Story's Equity, §§ 142, 143, 160–63.

2. Scruggs's power of attorney, not being a power coupled with an interest, was revoked by the death of his principal before the execution of the power.—2 Kent, 645; American Leading Cases, 415; 2 Mason, 244; 8 Wheat. 174, 203; 1 Humph. 294–99. Conceding, then, that the money was paid under the parol contract, the plaintiffs show a clear right to recover it back; because the defendant was unable to convey, 1st, on account of his want of authority after the death of his principal; and, 2dly, because the subject-matter of the contract had ceased to exist.

3. The equity of the bill consists, also, in the fact that the plaintiffs' notes, although void for want of consideration, may at any time be made the basis of a suit at law; their invalidity not appearing on their face.—6 How. (Miss.) R. 123; 2 Story's Equity, § 700; Elliott v. Piersoll, 6 Peters, 95; 6 Barbour, 605; 1 Johns. Ch. 520. That the contract was entire, and must be sustained or avoided

in whole, see Story on Sales, 240, 245; 2 Story's Equity, § 778.

4. The cross bill cannot be maintained, in either aspect. A specific performance will not be decreed, where it is doubtful whether an agreement has been concluded or is a mere negotiation.—14 Peters, 77; 1 Wheaton, 341; 4 Porter, 297. Where administration has been rightfully granted in another State, and is there pending, a court of chancery will not take jurisdiction, at the instance of the distributees, to compel a final settlement of the administration, but will remit the parties to the foreign tribunal. Worthy v. Lyon, 18 Ala. 784; Story on Conflict of Laws, 431.

WALKER, J.—The defendant's declaration, proved in Thompson's deposition, is sufficient evidence that Mrs. Driver died on the 9th February, 1853. The probability that the defendant, who was Mrs. Driver's attorney in fact, and her brother, and the executor of her will, was correctly informed as to the date of her death; the fact that there is nothing in the proof conflicting with the correctness of the admission, and that there is no perceivable reason for distrusting the memory or veracity of the witness, authorize the estimate of the declaration as reliable evidence. Mrs. Driver's death on the 9th February, 1853, operated an instantaneous revocation of the power conferred by her letter of attorney on the defendant. The defendant's agency cannot be classed with any of the exceptions to the general rule, either established, or suggested as reasonable and just in the law-books.

If the contracts described in the pleadings were made on the 10th February, 1853, the next day after Mrs. Driver's death, they were void, for the defendant's agency was terminated on the preceding day. The contract was committed to writing on the 10th day of the month. On that day the defendant, for Mrs. Driver, executed a conveyance of her dower and share as distributee in the estate; and the complainants executed written evidences of their promises to pay the purchase-money. It is contended that an unwritten contract, identical with that

committed to writing on the 10th February, existed previously to that day, which, being complete before the expiration of the defendant's agency, was not annulled by the act of afterwards committing it to writing. Two plantations, with slaves and other personal property upon them, belonging to the complainants' testator, were in different counties in the State of Mississippi; and the residence of the testator belonging to the estate was in Memphis, Tennessee. The evidence discloses that, on the 6th January, 1853, Hunt, one of the executors, and the defendant, were together on one of the plantations in the State of Mississippi, and had a valuation made of the personal property belonging to the plantation, and some house servants and other property that had been carried to the plantation from Memphis, by commissioners who were appointed by the probate court of the county in which the plantation was situated, to allot to Mrs. Driver her dower, and apportion to her her share of the personalty. Those commissioners, besides valuing the property, allotted to Mrs. Driver several slaves and a carriage and horses, at a fixed value. On the 28th January, 1853, Hunt and defendant had a similar valuation of the personal property on the other plantation in Mississippi made by commissioners appointed by the probate court of the county. These last named commissioners assigned to Mrs. Driver another family slave at a certain value. Hunt and the defendant then went to Memphis, dispatching a messenger to the complainant Giles L. Driver, with the request that he should meet them in Memphis. Giles L. Driver received the message, and met Hunt (his co-executor) and the defendant in Memphis on the 3d February, 1853.

It appears from the evidence, that Hunt declared, pending the proceedings at the two plantations in Mississippi, that *he* had bought Mrs. Driver's dower in the lands of her deceased husband, at five thousand dollars in cash, and her interest in the personal property at valuation, and her share in the choses in action of the estate; and that she was to take the house servants, and the carriage and horses, which were valued, at the estimate of the com-

missioners; that he (Hunt) was to have one and two years on the debt for the share in the personal property; and that they were to go to Memphis and ascertain the amount of Mrs. Driver's share of the debts due the estate. There is no proof that the complainant Giles L. Driver knew anything of the proceedings and negotiations between Hunt and the defendant, until he was reached by the messenger sent to obtain his attendance in Memphis. When informed by him of the arrangement entered into between Hunt and defendant, he neither assented nor dissented. After arriving at Memphis, the three (the two complainants, and the defendant) entered upon an examination of the debts of Driver's estate, with a view to the ascertainment of the amount of Mrs. Driver's share of them, after an allowance for the payment of the debts against the estate. This examination was continued up to the 10th February, 1853, when the contracts described in the pleadings were signed.

On the fourth of February, Hunt wrote a letter from Memphis to one W. Scruggs, from which we make the following extract: "We have just concluded a division of the estate. Mrs. D.'s share of the personal property amounts to $20,000, of which she takes in negroes, &c., $10,000. We purchased her dower interest in the lands unsold at Mr. Driver's death, for $5,000. Her share in the notes, crops, &c., I do not think will amount to more than $2,500 or $3,000. We have not quite closed the last matter yet. Your brother will leave for Huntsville in a few days. I let him have the carriage and horses for $650—a mere song."

After a careful study of the foregoing testimony, we have attained the conclusion, that the contract between the parties was never completed, until the writings were executed on the 10th February, 1853. In the first place, the evidence does not show that Giles L. Driver, one of the executors, assented to the contract until that time. The concession that the contract was assented to by one of the executors before the 10th of February, will not aid the defendant, because it is not competent for one of the representatives of the estate, without the concurrence of

another, to create against it, and fix upon it, by a contract for the purchase of property, a pecuniary liability. It has been twice decided in this State, that one of several executors or administrators cannot revive a debt barred by the statute of limitations.—Pitts v. Wooten's Executors, 24 Ala. 474; Caruthers v. Mardis, 3 Ala. 599. These decisions are placed upon the ground, that it is not permissible for one executor or administrator, by his promise or admission, to impose a personal liability upon his co-executor or co-administrator, without the knowledge or assent of the latter; *which* would result, if a judgment against the representatives of an estate, operating as an admission of assets, could be rendered upon such promise or admission.

It is true, that several executors or administrators are regarded, for most purposes, as one person; and therefore the acts of each, in relation to the regular administration of the estate, such as the sale, delivery, and possession of the goods of the estate, the release and discharge of the debts due to the estate, &c., are deemed the acts of all. Stuyvessant v. Hall, 2 Barbour's Ch. R. 151–160; Herald v. Harper, 8 Blackf. R. 170; Rick v. Gilson, 1 Penn. State R. (Barr) 54; Wheeler v. Wheeler, 9 Cowen, 34. But a different rule prevails as to those acts which may affect the personal responsibility of the several representatives of the estate. One executor could not subject the estate to a judgment, upon his promises to pay for property purchased by him, without the participation of his co-executor; for, if he could, he might fasten a personal liability upon his co-executor, without the consent or knowledge of the latter. Upon this principle, the authorities fully recognize, as a general rule, the doctrine that one executor or administrator cannot create a debt against an estate, where none existed before.—Hall v. Boyd, 6 Barr, (Penn. State R.) 267; James v. Hackley, 16 Johns. 273; Hammon v. Huntley, 4 Cowen, 493; Forsyth v. Ganson, 5 Wend. 558; McIntyre v. Morris, 14 Wend. 90.

The question of the admissibility and effect of admissions by one representative, in suits against all of them, designed to charge the estate, has been very carefully and

fully considered in the cases of James v. Hackley, Hammon v. Huntley, Forsyth v. Ganson, and McIntyre v. Morris, above cited from the New York Reports. In the case of James v. Hackley, where one administrator had acknowledged a certain balance to be due on a debt of the intestate, it is intimated that the admission was, *prima facie*, evidence against both administrators; but that its correctness might be controverted. In the other three cases, it is expressly decided, that the estate cannot be charged upon the admission of a part of the executors or administrators. To the same effect, also, is the decision in the case of Hall v. Boyd, *supra;* and the principle of those decisions seems to be fully recognized by this court, in the cases which hold that the promise of one executor or administrator will not revive a debt barred by the statute of limitations. It is not necessary for us in this decision to define the cases in which the admissions of any one or more of the representatives of an estate are evidence against all. Confining ourselves to the point necessarily arising, we merely deny that a charge against an estate can be established by the mere admission of a part of the executors or administrators.

From the principles above laid down it follows, that the contract described in the pleadings, which would create a large new liability against the estate, could not be made by Hunt, one of the executors, alone, and could not become the contract of the executors, binding the estate, until it received the assent of Giles L. Driver, the other executor; and that the contract cannot be established by the mere admission of Hunt, one of the executors. If it be conceded that the letter of Hunt, dated 4th February, 1853, shows that the contract was then complete, (which we are not prepared to admit,) it would not be sufficient to establish the contract charging the two executors representing the estate, because it is the naked admission of one executor. Besides this letter, there is no proof that Giles L. Driver ever asssented to the contract, until the papers were executed on the 10th February. In the absence of proof to the contrary, we must regard the execution of the papers as the consummation of the con-

tract. Whatever agreement or stipulations may have been previously made by Hunt, they could not make a contract by the executors of Driver. The liability of the executors, representing the estate, attached when the two united in giving their assent to the contract, and not sooner. There is no proof of such united assent until the 10th February, when the authority of the defendant had terminated.

The contract was executed under a mutual mistake as to the existence of the defendant's authority, and as to the existence of a right to dower in Mrs. Driver, and could not be binding on either party. The complainants have a right to recover back the money paid on the bill of exchange drawn by them, and to prevent the collection of the notes given by them.—Hitchcock v. Giddings, 5 Price, 135; Trippe v. Trippe, 29 Ala. 637.

We concur with the chancellor, that the defendant has made out a title to the slaves, and carriage and horses, independently of the contract, as an allotment to Mrs. Driver of a part of her distributive share of the estate of her deceased husband, which she takes at the valuation of the commissioners appointed by the Mississippi probate court.

We have not noticed the question of the effect of the statute of frauds, so much pressed in the argument of counsel. The contract was made in another State; and it is not averred in the original bill that there exists in that State any statute requiring conveyances of land to be in writing; and there is no proof in the transcript of any such statute. The complainants must, therefore, be denied the benefit of any conclusion favorable to them as complainants in the original bill which might have been drawn from that statute.

There are other considerations, conducing to show that there was no complete contract between the parties until the 10th of February; but we omit to notice them, because the view which we have taken is conclusive of that point in the case.

It is contended for the defendant, that the complainants have a complete remedy at law, by an action to recover back the purchase-money of Mrs. Driver's dower, and by

defense at law against the notes when sued upon. The assumption in this argument, that the complainants could recover the money paid by action at law, and that they could upon the facts alleged successfully resist a suit upon the notes, is undoubtedly correct. But the complainants are not bound to wait until the defendant may choose to institute suit upon the notes. The notes are negotiable by endorsement under the laws of this State, notwithstanding they may have been made in another State. Wilkerson v. Rutherford, 29 Ala. It is inferrible that the notes do not, upon their faces, disclose the want of consideration, but appear to be valid and binding securities. The delay in the determination of the question whether those notes are valid evidences of debt against the estate, must necessarily tend to embarrass the administration of the estate. The effect of a postponement of that question, until the period prescribed by the statute of limitations might approach completion, would probably be detrimental to the interests of the estate, and might injuriously affect the legatees. In the case of Hamilton v. Cummings, 1 Johns. Ch. 520, Chancellor Kent held, that the chancery court would not take jurisdiction in every case for the purpose of canceling a security for the payment of money, but that judicial discretion must, upon the circumstances of each case, determine the question.—Elliott v. Piersoll, 6 Peters, 95; 2 Story's Eq. Juris. § 700.

Adopting the principle above quoted from the case of Hamilton v. Cummings, we decide, that the bill and proof make out a case proper for the exercise of the preventive jurisdiction of the court to cancel the notes. We have been able to find no case, with such features as are found in this, in which the jurisdiction has been denied. The case of Hitchcock v. Giddings, 4 Price, is one in which the power of cancellation was exercised under circumstances not so strong as those of this case, although strikingly similar. See, also, Sessions v. Jones, 6 How. (Miss.) 123; Garrett v. M. & A. R. R. Co., 1 Freem. Ch. 70; Main v. Garner, 1 Martin & Yerger, (Tenn.) 383; Castor v. Mitchell, 4 Wash. C. C. R. 191.

The court, having jurisdiction to cancel the notes, will go on and do complete justice, by granting the complainants all the relief to which they are entitled, notwithstanding there may be an adequate remedy at law as to a part.—Stow v. Bozeman, 29 Ala. 397; 1 Story's Equity, § 71; Cathcart v. Robinson, 5 Peters, 263; Miller v. McCan, 7 Paige, 451.

Conceding that the complainants have a remedy at law, in an action of assumpsit, to recover the money paid for the widow's dower, the court, in our opinion, properly granted relief as to that matter, as it had jurisdiction upon an independent ground, and, by doing so, would render complete justice without an additional suit. There must be, however, a limit to the doctrine, that the jurisdiction over one subject of litigation may bring within the grasp of the court another matter of legal cognizance. Jurisdiction over one subject would not give the court control over a separate matter not connected with it. Such, however, is not the case here. The negotiations for the sale of the widow's dower, and of her share in the personalty, commenced together, and proceeded *pari passu;* and the sale of the two interests were finally consummated by the same writing. They are both parts of the same transaction, and the evidence conduces to show that the one would not have been made without the other. The same facts constitute the complainants' claim to relief as to both matters. Under such circumstances, we think that the chancellor properly granted relief as to both matters.

The two decisions of Worthy v. Lyon, 18 Ala. 784, and Calhoun v. King, 5 Ala. 523, are, perhaps, not altogether reconcilable. But whether we adopt the one or the other as a correct exposition of the law, we have an authority conclusive against the maintenance of the cross bill, as an application for the distributive share of Mrs. Driver in the personal estate of her deceased husband. The complainants are executors, qualified before the courts of other jurisdictions, in which the administration of the estate and the execution of the will are pending; and there does not appear to be any administration or assets

in this State, or any danger of loss to the defendant, if remitted to the foreign jurisdiction for the recovery of the distributive share of his testatrix.

The chancellor properly rescinded the contract of 10th February, 1853, *in toto;* which leaves the defendant to prosecute his claim to the share of his testatrix in the estate of her deceased husband, unembarrassed by the contract. Whatever rights the defendant may have under the statute of distributions, or under the decrees of the probate courts of Mississippi, are left unaffected by the contract. Such is the result of the chancellor's decree.

The decree of the chancellor is affirmed, at the costs of the appellant.

THOMPSON *vs.* LEE.

[BILL IN EQUITY FOR RESCISSION OF CONTRACT.]

1. *Objections to evidence.*—The appellate court will not, in a chancery case, consider an objection to evidence which was not raised before the chancellor.
2. *Rescission of contract on account of misrepresentations.*—A court of equity will rescind a contract, at the instance of the purchaser, on account of the vendor's misrepresentations as to the quantity of land subject to overflow; and it is immaterial whether the vendor knew the representations to be untrue.
3. *Release of equity of redemption set aside as fraudulent.*—Where a mortgagee avails himself of the advantages afforded by his possession of the property, his position as creditor, and the embarrassed condition and physical debility of the mortgagor, to obtain a release of the equity of redemption, a court of equity will set aside the transaction at the instance of the mortgagor.
4. *Ratification of contract after discovery of fraud.*—A court of equity will not rescind a contract, on account of the vendor's fraud, when it is shown that the purchaser, after becoming fully apprised of the fraud, ratified and confirmed the contract; but this principle does not apply, where the purchaser, being a weak and feeble old man, and having the most unlimited confidence in the vendor, is induced by professions of friendship and promises of indulgence, on the part of the latter, to execute a mortgage to secure the payment of the purchase-money, and afterwards to release the equity of redemption.
5. *Parties to bill of revivor.*—Where the purchaser files a bill for the rescission of a contract respecting real estate, and the cancellation of a mortgage on

slaves afterwards given to secure the payment of the purchase-money, and dies before the rendition of a final decree in his favor, his administrator is the only necessary and proper party to the bill of revivor, when it appears that a conveyance had never been executed by the vendor.

6. *Rents and improvements.*—Where a purchaser succeeds in obtaining the rescission of a contract on the ground of fraud, he is chargeable with the rent of the land during the time he held possession of it, and is entitled to a credit for valuable and permanent improvements erected thereon by him.

APPEAL from the Chancery Court of Perry.

Heard before the Hon. JAMES B. CLARK.

THE original bill in this case was filed by Thomas M. Thompson, against Columbus W. Lee, and sought, 1st, the rescission of a contract for the purchase of a tract of land, on account of the defendant's misrepresentations as to the quality of the land, and the quantity subject to overflow; 2d, the cancellation of a mortgage on several slaves, which was afterwards given to secure the payment of the purchase-money for the land; 3d, the cancellation of a second mortgage, subsequently given for the same purpose; and, 4th, the annulling and vacating of a subsequent transaction between the parties, by which the complainant released to the defendant his equity of redemption in the mortgaged property, surrendered the land, and gave up the bond for titles. The bill was filed in April, 1847. The contract for the sale of the land was made in the fall of the year 1841. The bill alleged, that the complainant was induced to purchase the land by the representations of the defendant, who professed great friendship for him, and in whom he had the most unlimited confidence, as to its quality, situation, advantages, &c.; that the tract contained about 450 acres, and the price was $15 per acre; that the defendant also represented the lands not to be subject to overflow from a stream which ran through them, with the exception of one or two acres, and promised to grant indulgence in the payment of the purchase-money, in consideration of complainant's embarrassed condition; that defendant executed his bond for titles in pursuance of the contract, conditioned that titles should be made on the payment of the purchase-money, and complainant entered into possession of the land; that the lands proved

to be very unproductive, and totally unsuited for the purposes for which the defendant had represented them to be valuable; that one half of the entire tract was overflown every year at a time which ruined the crops growing on it; and that complainant failed to make a crop during the entire continuance of his possession.

The bill further alleged, that complainant was a man of feeble intellect, and unlearned, being unable to read writing, (though he could sign his name,) entirely ignorant of legal forms and technicalities, and having great confidence in the defendant's legal attainments; that when he discovered the lands to be subject to overflow, he proposed to rescind the contract, but the defendant declined to do so; that the defendant applied to him, in 1843 or 1844, for a mortgage on his slaves to secure the payment of the purchase-money, and complainant then urged him to take back the land, on such terms as might be just and reasonable; that the defendant refused to take back the land, urged the complainant to give him a mortgage to secure the purchase-money, and promised unlimited indulgence in the payment of the money, if secured in that way, so long as the proceeds of the cotton crops grown on the lands, after paying the expenses of the complainant's family, were applied in extinguishment of the debt; that the complainant, induced by the defendant's promises and persuasions, executed to him on the 7th February, 1844, a mortgage on fifteen slaves; that on the 15th May, 1844, he was induced by defendant to execute another mortgage, on the residue of his property, for the further security of said debt, and, in March, 1845, to release his equity of redemption in the mortgaged property, re-surrender the land to the defendant, and deliver up to him his title-bond; that these last deeds were not freely and voluntarily executed by him, but were obtained from him by the defendant, by taking an undue advantage of their relative situations, of the complainant's embarrassed pecuniary condition, and of his ill-health; that the defendant, at the time of the last transaction, had already taken possession of the mortgaged property, and afterwards dispossessed complainant of the land; and

that some time after defendant had thus deprived complainant of all his property, he voluntarily conveyed four of the slaves to the complainant's wife.

The defendant answered the bill; admitting the sale of the land, and denying all the charges of fraud, misrepresentation, and undue advantage on his part. He alleged, that his representations as to the quality of the lands, the quantity subject to overflow, &c., were the mere expression of an opinion, which he still believed to be true; that the plaintiff, who had long been engaged in farming and planting, examined the lands in person before purchasing them, and bought on the faith of his own judgment; that the plaintiff's failure to make a good crop was attributable to his own mismanagement. He further alleged that, at the time the first mortgage was executed, none of the purchase-money had been paid, though two installments were due, and there had been a considerable decline in the price of property; that these facts induced him to ask for the mortgage; that each of the mortgages was executed by the plaintiff freely and voluntarily; and that the subsequent transactions between them, ending in the release of the equity of redemption of the mortgaged property, the surrender of the title-bond, and the deed of gift to Mrs. Thompson, were entered into at the suggestion of the plaintiff, and on his request that defendant, to assist n relieving him from his embarrassments, would take all his property, and, after discharging the incumbrances on it, dispose of it in such manner as he might think most advantageous for the interests of himself and his family; and that defendant, in pursuance of this arrangement, after paying two notes due to one Alexander, and the amount due to himself on account of the purchase-money for the land, conveyed five of the slaves, which constituted the entire residue, to Mrs. Thompson.

On final hearing, on pleadings and proof, the chancellor refused to grant a rescission of the original contract, but set aside the release of the equity of redemption, ordered the title-bond to be delivered up to Thompson, the notes for the purchase-money to be held as subsisting

securities in Lee's hands, and the relation of mortgagor and mortgagee to be re-established between the parties.

From this decree, the complainant appealed; assigning as error the refusal of the chancellor to grant a rescission of the contract. By consent, cross assignments of error were filed on the part of the defendant, impeaching the correctness of the chancellor's decree in the relief granted to the complainant.

During the pendency of the cause in this court, the complainant's death was suggested; and leave was thereupon granted by the court, on motion, to revive the suit in the names of his heirs-at-law or administrator, or both, as might be deemed proper by the court. The cause was submitted, after elaborate argument, at the June term, 1854, and was held under advisement until the present term; several re-arguments, both oral and written, being ordered and had in the meantime. The great length of the printed arguments, embodying a detailed statement and analysis of the evidence, as well as a full discussion of all the legal questions presented by the record, precludes the possibility of their insertion in the report. The subjoined abstract of the points made, with the authorities cited in support of them, is condensed from the printed arguments of Mess. I. W. Garrott, for the appellant, and Wm. M. Brooks, with whom were Wm. M. Byrd, Wm. M. Murphy, and Geo. P. Blevins, for the appellee.

Points made, and authorities cited, for the appellant:

1. The defendant's misrepresentations as to the quality of the land, and especially as to its liability to overflow, whether made knowingly or ignorantly, entitle the complainant to a rescission of the contract.—Read v. Walker, 18 Ala. 324; Monroe v. Pritchett, 16 Ala. 785; Tucker v. Woods, 12 Johns. 190; Smith v. Richards, 13 Peters, 26, 38; 1 Story's Equity, § 193.

2. The fact that the purchaser, being a man of weak understanding, dealt with one in whom he reposed great confidence, and who abused that confidence, under circumstances which show undue influence and imposition, is sufficient to justify the interposition of the court in his

behalf.—1 Story's Equity, §§ 238, 303; Gartside v. Isherwood, 1 Bro. Ch. 558; Rumph v. Abecrombie, 12 Ala. 64; Morrison v. McLeod, 2 Dev. & Bat. Eq. 22; Buffalow v. Buffalow, 2 Dev. & Bat. 241; 8 Cowen, 361; Boney v. Hollingsworth, 23 Ala. 690; 6 Vesey, 266, 278; 9 Vesey, 292; 3 Vesey & B. 117; 9 Price, 169.

3. Thompson's retention of possession, after discovering that the lands were subject to overflow, cannot be held a waiver of the fraud, or a confirmation of the contract. His continuance in the possession is shown to have been the result of Lee's persuasions and influence. It appears, moreover, that he was assured by Lee, pending the negotiation, that if he did not like the land, after trying it, he might give it up, and pay rent. In addition to these facts, the contract was incapable of confirmation, so long as the relative positions remained unchanged.—8 Cowen, 361, 375; 15 John. 571; 7 Mar. 353; 2 Beavan, 76.

4. The mortgage, subsequently given to secure the purchase-money, cannot be considered as a ratification of the contract, such as will take away the right to rescind on account of the fraud. The circumstances under which the mortgage was given, the relations of the parties, the confidence confided in the mortgagee, the undue influence exerted by him over the mortgagor, and the embarrassed condition of the latter, render the mortgage itself fraudulent.—1 Sugden on Vendors, 326, § 26; Baugh v. Price, 1 Wils. 329; 1 Story's Equity, § 345; Whelan v. Whelan, 3 Cowen, 537; 1 Russ. & My. 425. Besides, it is not put in issue by the pleadings, and is not shown by the testimony, that Thompson was apprised, when he gave the mortgage, that it would confirm the previously invalid sale; and this fact is essential to constitute a confirmation.—1 Sugden on Vendors, 327, § 41; 1 Russ. & My. 425; 5 Dana, 232; 3 Dana, 289; 4 Dana, 269; 9 Dana, 452; 1 Ball & Beatty, 303; 2 Ball & Beatty, 304, 317; 2 Sch. & Lef. 474; 1 Bro. Ch. 338; 12 Vesey, 355, 373; 18 Vesey, 120; 2 Cox's Ch. Cas. 253–75; Chitty's Equity Digest, 507, §§ 7–13.

5. The position of the parties as mortgagor and mortgagee is entitled to great weight in determining the

validity of the subsequent transactions between them, and throws upon the defendant the *onus* of showing (what he signally fails to show) that he derived no advantage from those transactions, but paid full value, and that the mortgagor acted freely and voluntarily, and with full knowledge of all the facts.—2 Sch. & Lef. 214; 2 Cruise's Dig., 144, § 86; 2 Sugden on Vendors, 367, § 6.

6. The chancellor should have gone further, and, although declaring the mortgage valid, should have decreed that Lee return the slaves and other property, taken from Thompson, and account for their use and hire. The mortgage itself guarantied the possession of the property to Thompson; and if Lee, by force, fraud, or the exercise of undue advantage, obtained the possession in violation of the terms of the contract, he should be required to restore it, and to account for its use and profits, before he is placed in a position to proceed for a foreclosure of the mortgage.

7. It was not necessary that the plaintiff should formally offer to pay the defendant the amount due on the notes for the purchase-money, when his whole bill proceeds on the idea that the defendant has been already overpaid. Elliott v. Boaz, 9 Ala. 772–79; Nelson v. Dunn, 15 Ala. 515; 1 Dan. Ch. Pr. 442.

4. The relief granted by the chancellor was within the scope and purview of the case made by the bill, and not inconsistent with the relief therein prayed.—Mitford's Eq. Pl. 38, 39: Story's Eq. Pl. § 41; Strange v. Watson, 11 Ala. 325.

Points made, and authorities cited, for the appellee:

1. That Thompson was a man of ordinary intellect, and, consequently, fully capable in law of making a contract, is proved by the testimony of seventeen disinterested witnesses, while not one witness testifies to the contrary. That he made a good trade in purchasing the land, that the land was intrinsically worth the full amount he paid for it, and that Lee's representations as to its quality and productiveness were true, is established by the concurrent testimony of sixteen credible witnesses;

while the complainant's witnesses to the contrary are but eleven, of whom four are his sons and son-in-law. That the complainant's failure to make good crops on the land was attributable solely to his own indolence and mismanagement, is abundantly proved. And upon the question of undue influence, the complainant's own testimony is inexplicable, and contradicted in the most positive manner by several disinterested witnesses. There is, then, no ground for a rescission of the contract established by the evidence.

2. If the contract was originally invalid as alleged, the defendant has waived the right to insist on a rescission, by his laches, acquiescence, and positive ratification of it by repeated acts.—Griggs v. Woodruff, 14 Ala. 16; Saddler v. Robinson, 2 Stew. 520; Duncan v. Jeter, 5 Ala. 604; Clements v. Loggins, 1 Ala. 622; Fitzpatrick v. Featherstone, 3 Ala. 42; Rice v. Davis, 4 Ala. 83; Smith v. Robinson, 11 Ala. 840; Parks v. Brooks, 16 Ala. 529; Gilmer v. Ware, 19 Ala. 258; Lawrence v. Dale, 1 John. Ch. 42; Dill v. Camp, 22 Ala. 249.

3. The relief granted by the chancellor was inconsistent with the case made out by the bill. The bill alleged, that the sale and the notes given for the purchase-money were fraudulent and void, and asked that they might be set aside; that the mortgages were fraudulently obtained, and asked that they might be canceled. The decree sets up the notes and mortgages, and declares them valid and subsisting securities. That there is a fatal inconsistency between the allegations of the bill and the relief granted, is shown by the following authorities: Cooper's Equity Pl. 14; 2 Madd. Ch. 139, 537; 16 Peters, 182; 8 Leigh, 519; 2 Dev. Eq. 44, 403; 1 Bland, 236; 6 Har. & John. 29; 7 Wheaton, 522; 6 John. 564; 12 Leigh, 69; 13 Ala. 693; 22 Ala. 106; 2 Paige, 396; 1 Barb. Ch. 329; Litt. Sel. Cas. 146. Nor can the decree be sustained under the general prayer.—1 Story's Eq. Pl. § 340; 1 Dan. Ch. Pr. 421–24; 1 Dev. Eq. 437; 2 Paige, 397; 1 Sm. & Mar. 17; 1 Edw. Ch. 634; 4 Dess. 330; 9 Yerger, 301; 18 John. 560; 5 Beavan, 103.

STONE, J.—The mass of the evidence in this case is so great, that any attempt at an analysis of it would swell this opinion beyond reasonable dimensions. We shall, therefore, content ourselves with a statement of the conclusions we draw from it. We are convinced, then, by the testimony—

1. That Mr. Thompson's intellect should be classed as ordinary; and that he was credulous, with but little strength of will;

2d. That he trusted in Lee with child-like confidence;

3. That he was induced to purchase the land, partly by the representations of Lee as to its quality, and partly by Lee's protestations of friendship and gratitude;

4. That the quantity of the land subject to overflow was misrepresented and understated by Lee;

5. That the land was not worth the price for which it was sold;

6. That when Lee applied for the first mortgage, Thompson proposed a rescission of the contract, which Lee did not accede to;

7. That Thompson was induced to execute the first mortgage by Lee's reiterated expressions of friendship, and assurances of liberal indulgence;

8. That in procuring a re-surrender of the lands, and a sale of the slaves and other property, Lee availed himself of the advantages he apparently had as mortgagee and creditor, and of the embarrassed condition of his debtor; and that Thompson entered into that contract, rather by force of the circumstances around him, than the free exercise of his judgment.

[1.] The first and second of these consecutive propositions are sustained by the uncontroverted facts in this case, independent of the opinions of the witnesses. It is here argued, that *influence* and *confidence* can not legally be proved by the opinions of witnesses. We need not announce what would be our opinion on this point, if it were presented for our decision. It is not so presented. The record does not inform us that this question was brought to the notice of the chancellor; and, in the absence of such information, we will not consider any

objection which seeks to exclude the evidence.—McKee v. Nelson, 4 Cowen, 355.

Holding Lee to the admissions in his answer, as to the quantity of land which he represented as subject to overflow, the third and fourth propositions are established by all the testimony bearing on those points.

The result of all the evidence, though there is in it great and irreconcilable conflict, fixes the value of the land much below fifteen dollars per acre.

The testimony certainly establishes the proposition, that Thompson desired and proposed a rescission of the contract. True, he did not claim it *as a matter of right*, growing out of the fraudulent misrepresentations of Lee as to the overflow. He alluded, however, to the fact that the land did overflow to a greater extent than had been represented, and claimed the right to rescind, in pursuance of what he said had been their first agreement; namely, that if Thompson, after testing the land, did not like it, he might rescind the contract, and pay rent for the land. Lee refused to rescind, and stated he did not remember any such stipulation in the contract.

It is here argued, that there is no averment in the bill of an offer to rescind. One charge in the bill is in the following language: "Your orator further charges, that after he had tested the quality of said lands, and found them subject to overflow as aforesaid, he proposed to rescind the contract of sale, which defendant declined." This is certainly the averment of a direct offer to rescind. We do not think the next succeeding averment in the bill ought to be construed as a qualification of the foregoing. It rather appears to be another and distinct offer of the land back, "on such terms as might be reasonable and just." There are no words which connect the two sentences as relating to one and the same offer of rescission.

We reserve the seventh proposition for after consideration.

In regard to the eighth proposition, we adopt the language of the able chancellor who rendered the decree in this cause: "The whole transaction seems to have been a sweeping business; in which Lee seemed to settle the matter to suit

himself; and while the evidence is very conclusive that the complainant, near three months afterwards, released the title-bond, and relinquished the equity of redemption in the slaves, still it must be remembered, that Lee had taken possession, as some of the evidence shows, by virtue of his mortgage; that he was still in possession under that mortgage, or the agreement for a release; and that the whole transaction had been one most disastrous to the complainant, who had been pursuaded by Lee to purchase his lands, and had, by unfortunate circumstances, within little more than three years, been stript, not only of this land, but a likely lot of slaves, twelve, if not seventeen in number. Under such circumstances, it is impossible to say that the complainant and Lee stood on an equality, when the release was made. * * * The complainant was an old, feeble man, of moderate intellect, with spirits broken, and subdued by misfortune; while, on the other hand, Lee was a man of wealth and high intellect, in the possession of all the property to which complainant had any claim, under a mortgage that he admits he promised to indulge almost indefinitely, before foreclosing it, or under an agreement, the terms and particulars of which resulted in his being dispossessed of all the property, at a time when he was preparing to pitch a crop."

Ch. J. Chilton, in considering this question, employed the language, as the result of the evidence, "that this alleged sale was made under circumstances of great inequality—such as were well calculated to give Lee a decided advantage over Thompson, and to deprive the latter in a great measure of his free agency. The proof is conflicting, as to whether Lee did not take possession under his mortgage before the alleged purchase. But be this as it may, he reminded Thompson that it was forfeited. Thompson was at his mercy—embarrassed, dispirited, and enfeebled by disease. A general sweeping sale is made. No specific price is agreed on for each slave or article sold; but it seems the land, with all the improvements put on it by Thompson, the gin, two horses, and a mule, with all Thompson's negroes, (seventeen in num-

ber,) are worth the amount of the claims due to Lee, and the demands due to Alexander."

In addition to what is above so forcibly expressed, it is not out of place to add, that at the time the terms of this settlement were agreed on, Thompson was in wretchedly bad health, if he was not bed-ridden. His attending physician testifies, that he was physically incapable of attending to business.

Another fact in the record should, in our judgment, weigh something. A period of only a little more than a year had elapsed, since Lee had promised almost unlimited indulgence, if Thompson would give him such portion of his cotton crops as should remain after paying for his coffee, &c. Thompson had complied with this agreement; and yet we find Lee, according to the testimony most favorable to him, indulging the remark, that his money had been long due.

[2.] If the first purchase, and the so called settlement above described, made up the sum of this transaction, we could not hesitate to grant to complainant all the relief he asks for. The purchase would be rescinded, on account of the misrepresentation of the quantity of land subject to overflow. On this point, it is immaterial whether Lee knew the representation to be untrue.—See the authorities collected in Trippe v. Trippe, 29 Ala. 643; Foster v. Gressett, 29 Ala. 393; Atwood v. Wright, 29 Ala. 346; Williams v. Mitchell's Adm'r, 30 Ala. 299.

[3.] Neither can the so called settlement be permitted to stand.—See 1 Story's Equity, §§ 261, 251; Hyndman v. Hyndman, 19 Verm. 9.

[4.] It is contended, however, that Thompson, with a full knowledge of the misrepresentations of Lee, and of any fraud that may have been practiced upon him, repeatedly ratified the contract, and has thus precluded himself from insisting on a rescission. It is conceded, that if one who has been defrauded, and who has become fully apprised of the fraud, afterwards ratifies such voidable contract, or enters into new stipulations in regard to the subject-matter of the contract, inconsistent with his right to insist on a rescission, and there be nothing more in the

transaction, he can not be heard to complain of such fraud.—Griggs v. Woodruff, 14 Ala. 16; Sadler v. Robinson, 2 Stew. 520; Parks v. Brooks, 16 Ala. 529; Foster v. Gressett, *supra*. This principle embraces all those cases where, either from the fraud or misrepresentation of the vendor, the purchaser is armed with a right to rescind. In all such cases, if the purchaser, after discovering the fraud, do any act inconsistent with his right to rescind, and such act be not superinduced by the fraud of the vendor, he must be held to his bargain.

But there is another class of cases, which comes under a different rule. We refer to contracts of parties between whom there exists some peculiar confidential or fiduciary relation. All contracts of this class are regarded, *prima facie*, as constructively fraudulent; and the *onus* is cast on the party seeking to set them up, of proving the *bona fides* of the transaction, and of repelling the imputation of bad faith and oppression which the law casts on him.—See 1 Story's Equity, §§ 307–8–9; Goddard v. Carlisle, 9 Price, 169; Boney v. Hollingsworth, 23 Ala. 690. To give validity to a confirmation of a contract, such as last stated, it must be shown that the party was "fully acquainted with his rights; that he knew the transaction to be impeachable which he was about to confirm; and that with this knowledge, and under no influence, he freely and spontaneously executed the deed."—Dunbar v. Tredennick, 2 Ball & Beatty, 304; Roche v. O'Brien, 1 *Ib.* 330; 1 Story's Equity, § 345, and note.

This case, it is true, is not one of technical trust and confidence. These parties did not stand in any relation, one to the other, which, *per se*, imposed on Lee the *onus* of repelling the imputation of fraud. Hence we hold, that if this case stood on the naked ground, that Thompson confided in Lee as his friend, and that in the contract Lee, by accident or superior skill, made a profitable bargain, there is no principle of law which would justify us in granting to complainant the relief he prays. Such a principle would place the man of honorable bearing under disabilities, from which the notorious sharper would be exempt. The law does not exact such scrupulous morali-

ty.—1 Story's Equity, § 308. On the other hand, it is well and clearly settled, that "if confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interests, and overreaching bargains." In Dent v. Bennett, 4 Mylne & Craig, 269, Ld. Cottenham, quoting from Sir Samuel Romilly, said, "The relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another."—See, also, Huguenin v. Basely, 14 Vesey, 273; Rumph v. Abercrombie, 12 Ala. 64; Morrison v. McLeod, 2 Dev. & Batt. 221; Buffalow v. Buffalow, *ib.* 241; Gartside v. Isherwood, 1 Bro. C. C. 560; Gibson v. Jeyes, 6 Vesey, 278; Whelan v. Whelan, 3 Cowen, 576; Fanning v. Dunham, 5 Johns. Ch. 122; Lester v. Mahan, 25 Ala. 445; Crowe v. Ballard, 1 Vesey, jr., 215.

The act which tends most strongly to prove confirmation in this case, is the execution of the first mortgage. That act, if it stood unexplained, we would be disposed to hold a waiver of the right to rescind the contract of purchase. Was that mortgage the voluntary, uninfluenced act of a free man? The bill charges, among other things, that Lee induced Thompson to execute the mortgage, by strong and oft repeated professions of friendship, and promises of almost indefinite indulgence. The answer does not, in terms, deny these professions of friendship, or promises of indulgence. The testimony, on this point, fully sustains the averments of the bill. The letter of Lee, found in the record at page 14, to our minds, furnishes more than simple evidence of a promise to indulge, given after the execution of the mortgage. If nothing on that subject had been previously discussed between the parties, it is not probable that letter would have been written. If the letter was in answer to any previous request of Mr. Thompson, either verbal or in writing, there would most likely be found in it some expression pointing to that fact. Nothing of the kind is found in the letter. To say the least of it, it is a singular production under the circumstances. We think it fully

corroborates the witnesses, who testify to previous promises of indulgence. That Lee had almost unlimited control over Thompson, and knew that he had such control, we think is fully sustained by the record. It is also shown, as we have before stated, that notwithstanding Thompson faithfully complied with his agreement to turn over his cotton crops to Lee; yet, in little more than one year after the lavish expressions of friendship and intended indulgence by the latter, we find him at least anxious to collect his debt. Some of the witnesses say, that he took possession of the entire property without the previous knowledge or consent of Thompson. The testimony most favorable to him puts in his mouth the expression, that his debt had been a long time due. This, too, at a time when Thompson was not in a physical condition to attend to business. In this connection, we feel it our duty to refer to the expression of Lee to the witness Fields, "that the set or family of Thompsons were not capable of holding property without a guardian." Although this remark was used in jest, it contrasts significantly with the strong expressions of friendship and gratitude previously indulged.

The execution of the second mortgage, and the payment of the cotton, may be explained on the same principle. The influence of Lee over Thompson, and the plighted friendship of the former, continued unbroken through those two transactions. Indeed, the payment of the cotton was in strict compliance with the alleged verbal agreement.

We feel it our duty, then, to declare, as the result of the evidence found in the record, that the defendant has failed to show a ratification by the complainant of the original contract in this case. Thompson had unbounded confidence in Lee; Lee fostered and encouraged that confidence—held out to the feeble old man the strongest hopes; and the proof shows that he did not keep the influence he exerted over Thompson "free from the taint of selfish interest." We think the entire transaction, disastrous in its results as it was rapid in its consumma-

tion, receives its complexion from the last act, which left the complainant destitute.

The deed of gift from Lee, in trust for Mrs. Thompson, secures a vested remainder in the children of the latter. Those children are not made parties to this suit, and hence no relief can be granted as to the five slaves thereby conveyed. Lee, having voluntarily settled them on Mrs. Thompson, with the knowledge and approbation of Mr. Thompson, should not be held accountable for them.

[5.] The conclusions we have attained, render it unnecessary and improper that the heirs of Thomas M. Thompson should be parties to the revivor. The administrator alone, John F. Thompson, is a necessary party; and this suit is, therefore, revived in his name as such administrator.

The decree of the chancellor is reversed; and this court, proceeding to render such decree as the chancery court should have rendered, doth hereby order and decree, that the contract for the purchase of said lands, the notes given for the purchase-money, and the two several mortgages executed by Thompson to Lee to secure the purchase-money, are hereby vacated, annulled and avoided. The conveyance of the slaves by Thompson to Lee, to the extent of the twelve slaves received and retained by Lee, is also set aside, vacated and annulled.

The registrar will take and state an account, charging Lee with the value of such of said twelve slaves as he disposed of before this bill was filed, with interest on that value. The complainant has the option of taking the price for which Lee sold the slaves, or the value at the time of the conversion, to be ascertained by the registrar. Williams v. Crum, 27 Ala. 468; Craft v. Bullard, 1 Smedes & Marsh. 366. If the complainant elect to take the value at the time of the conversion, and that conversion be fixed at the time of the sale; or, if he take the price for which Lee sold the property, then Lee must be charged with reasonable hire for the slaves while they were in his possession, and interest upon it.

Such of the slaves as remained in the possession of said Lee at the filing of the bill, and their increase, if they can

be obtained, it is ordered, adjudged, and decreed, that the complainant recover of the said defendant, together with reasonable hire therefor; or the value of such slaves with interest, if said slaves can not be obtained.

Lee must also be charged with whatever money and other property he has received from the complainant, and not otherwise accounted for, with interest upon it. The complainant must be charged with reasonable rent for the land while in his possession, and interest upon it. He must also be charged with the two small notes he owed to Lee on other transactions, the payment made by Lee on the Alexander debt, and any other debts of Thompson paid by Lee with the privity and consent of the former; with interest on these several sums. Thompson must be credited with the value of any permanent and valuable improvements placed on the land by him, and with a reasonable price for his labor and materials in planting a crop of oats, and preparing the ground in the spring of 1845, with interest on these items.

In taking the account, the registrar will consult the pleadings and proofs on file, and such other legal evidence as may be offered.

Let the costs of this appeal and the costs of the court below be paid by the defendant Lee.

PINKSTON *vs.* McLEMORE.

[BILL IN EQUITY BY WIFE, AGAINST EXECUTION CREDITORS OF HUSBAND, TO ENJOIN SALE OF HER SEPARATE PROPERTY.]

1. *Separate estate of wife in proceeds of her own labor.*—The husband may, by gift or contract, create in his wife a separate estate in the proceeds of her own labor; the validity of such gift, as against creditors, being subject to the same rules which apply to other voluntary conveyances.
2. *Validity of voluntary conveyance.*—A contract between husband and wife, by which a separate estate is created in the wife in the earnings of herself and

her domestic servants, is void as to the existing creditors of the husband, but valid as to his subsequent creditors, unless assailable for intentional fraud.

3. *Separate estate in wife created by gift from third person.*—If a purchaser at mortgage sale of the husband's property, after selling a portion of the property sufficient to reimburse him for the purchase-money paid, voluntarily conveys the residue to a trustee, for the sole and separate use of the mortgagor's wife; and there is no fraud in the transaction, the wife takes a separate estate in the property, which cannot be reached by her husband's creditors.
4. *Proof of ownership of personal property.*—Although the general principle, that possession is presumptive evidence of the ownership of personal property, may not ordinarily apply to a possession by the wife during coverture; yet, where it appears that the wife was authorized by a decree of the chancery court to accumulate property for her separate use, had means sufficient to have purchased it, and claimed and controlled it as her own, and that the husband had no property or means with which to procure it,—this is sufficient, *prima facie*, to establish the wife's ownership, and cast the *onus* upon the husband's creditors to show its liability for his debts.
5. *Proof of actual fraud in voluntary conveyance.*—A contract between husband and wife, by which a separate estate is created in the wife in the earnings of herself and her domestic servants, after defraying the family expenses, will not be declared void, at the instance of subsequent creditors of the husband, on proof that he was greatly embarrassed with debts and contingent liabilities when the contract was made; when it also appears that he then possessed a large estate, consisting of real and personal property, which was then unincumbered, and which is not shown to have been insufficient for the payment of his debts; and that money was collected from him under execution for five or six years afterwards.

APPEAL from the Chancery Court of Montgomery.
Heard before the Hon. WADE KEYES.

THE bill in this case was filed by Mrs. Matilda S. Pinkston, suing by her next friend, against James K. Pinkston, her husband, Moses McLemore, and Rebecca Smith; and sought to enjoin the two last named defendants from further proceedings at law, to subject to the satisfaction of their several judgments against said James K. Pinkston, certain slaves and other personal property in which complainant claimed a separate estate. It alleged, in substance, that Mrs. Pinkston made an agreement with her said husband, in 1839 or 1840, that she would defray all their family expenses out of the earnings of herself and four domestic servants, if he would allow her to retain the surplus for her separate use; that her husband assented

to this arrangement, and placed the four slaves entirely under her control; that at this time he was possessed of a large estate, consisting of lands and slaves, a large portion of which he had derived by his marriage, and owed several debts of inconsiderable amount; that under this contract, by the exercise of industry and economy, complainant was enabled to realize from the proceeds of the labor of herself and servants a sum which, after paying all the current family expenses, and assisting her husband in the payment of his debts and the education of their children, amounted in 1850 to over $2,000; that in July, 1846, Moses McLemore conveyed by deed of gift several mules and horses to a trustee for her separate use; that in February, 1849, said McLemore also conveyed to said trustee three slaves which he had bought at a mortgage sale of her husband's property, and the purchase-money for which she refunded to him out of her separate earnings; that McLemore purchased other property at said mortgage sale, and, after re-selling a portion sufficient to reimburse him for the purchase-money, conveyed the balance to said trustee, for complainant's sole and separate use; that in July, 1850, complainant obtained a decree of the chancery court of Montgomery county, declaring her a free-dealer, and settling her future earnings and acquisitions of property on said McLemore as her trustee; and that said McLemore, becoming unfriendly to her from some cause unknown, had lately caused several executions of which he had the control, some in favor of himself as executor of Joseph Harper, deceased, and others in favor of Rebecca Smith, whose agent he was, to be levied on the slaves and other property which the complainant had accumulated from the sources above stated. The bill prayed an injunction of further proceedings at law, and general relief.

A decree *pro confesso* was entered against Pinkston. The other defendants answered; denying all the material allegations of the bill; and alleging that the contract between complainant and her husband, if any such was made, was fraudulent and void as to the creditors of the

husband, who was then, if not insolvent, greatly embarrassed with debt.

On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

THOS. WILLIAMS, for the appellant.

WATTS, JUDGE & JACKSON, *contra.*

WALKER, J.—The complainant claims to have made a contract, in 1839 or 1840, with her husband, whereby she was to have a separate estate in the earnings of herself and four domestic servants, and out of them defray the family expenses. The earnings of a married woman belong to the husband. He may, by contract with her for a consideration, or by gift, invest her with a separate estate in her earnings, which will be maintained in equity against the husband and his representatives; but such separate estate, created by gift, can not be valid against existing creditors, for the same reason which avoids other voluntary conveyances as to such creditors.—2 Eq. Cas. Abr. 155; 11 Viner's Abr. 180–181; 2 Story's Eq. § 1375; 2 Roper on H. & W. 137; 2 Bright on H. & W. 302; McLean v. Longlands, 5 Vesey, 78; Pinney v. Fellows, 15 Verm. 525; Baron v. Baron, 24 Verm. 375; Neufville v. Thompson, 3 Edw. Ch. 92.

2. The contract alleged to have been made between complainant and her husband, and which is claimed to have the effect of investing her with a separate estate in the earnings of herself and her domestic servants, must, under the principles above stated, be void as to the existing creditors of the husband, and valid as to subsequent creditors, unless it is assailable for intentional fraud. The proof establishes the allegation of the answers, that the debt of the defendant Smith was subsisting at the time of the alleged contract between complainant and her husband; and the contract, being altogether voluntary, is void as to that defendant. The earnings of the complainant and her servants were, as to the subsisting creditor, the property of the husband; and the property bought with

those earnings was also the property of the husband, and, therefore, liable to the execution levied upon it. It follows that, as to the defendant Smith, the bill was properly dismissed.

3. The executions in favor of Moses McLemore, as executor of Joseph Harper, were levied upon the following property, to-wit: two bay horses, a buggy and harness, one wagon and harness for four horses, and one sorrel horse. The buggy and harness were obtained in exchange for a carriage. The carriage and two bay horses were purchased in 1846, together with some other property, at a mortgage sale of some of the property of James K. Pinkston, the complainant's husband, by said McLemore. The property so purchased was conveyed by McLemore, of his own motion, to a trustee for the separate use of Mrs. Pinkston; and a sufficiency of the property was sold to reimburse to McLemore the purchase-money paid, leaving the residue a separate estate in the hands of Mrs. Pinkston. In this transaction there is no evidence of fraud. The property was sold under a mortgage; bought and paid for by the purchaser, who gives the remainder, after the sale of a sufficiency to reimburse himself, to Mrs. Pinkston. The property thus acquired by Mrs. Pinkston would not be liable to the payment of her husband's debts. The property, when purchased and paid for by Moses McLemore, was his; and he had an unquestionable right to invest Mrs. Pinkston with an exclusive title, which would be beyond the reach of her husband or his creditors.

The wagon and harness levied on is shown by the proof to have been purchased by Mrs. Pinkston long after the contract with her husband that she might have her earnings as a separate estate; and this property could not be liable to any creditor of the husband, whose debt was of date subsequent to that contract.

Mrs. Pinkston, in 1851, bought and paid for a sorrel horse, which was conveyed by the seller to her separate use. We think the evidence authorizes the conclusion, that this was the same sorrel horse levied on by virtue of the execution in favor of Moses McLemore. In 1850,

Mrs. Pinkston obtained a decree in the chancery court, under the act of 31st January, 1846, securing to her sole and separate use her earnings and accumulations. The sorrel horse was purchased after that decree. The wagon and harness were also purchased after the same decree. There are two negroes, Phil and Bella, which the bill alleges, and the answer of McLemore admits, were about to be levied on by virtue of McLemore's executions when the bill was filed. The other property, besides that levied upon and about to be levied upon, it does not appear either from the bill or proof that the defendants intended to disturb; and as to it there is, therefore, no case made out requiring redress in a court of justice, and we do not on that account consider the question of the complainant's title to it. It does not appear, either from the bill or in the testimony, how Mrs. Pinkston obtained the slaves Bella and Phil. The proof shows that she obtained them one year before the deposition of the witness was given, in October, 1852. It follows, that those slaves were procured by her after the chancery decree securing to her sole and separate use her sole and separate earnings. These slaves she controlled and treated and claimed as her own. It does not appear that they ever belonged to, or were in the possession of, Mrs. Pinkston's husband. It is also proved with satisfactory certainty, that for a long time before those negroes were possessed by the complainant, her husband had neither owned nor claimed any property, nor had any means to procure it. It further appears that Mrs. Pinkston had, by the use of extraordinary industry, economy, and skill in the management of her affairs, been in the receipt of an income sufficient to have enabled her to make purchase of these slaves.

4. Now, the general principle is, that from possession itself the law will presume ownership of personal property, and cast the *onus* of proof upon the party assailing the title inferred from possession. We do not say that this doctrine applies ordinarily to a possession by the wife, where the conjugal relation exists; but, where the wife has been authorized under the law of the land, by a decree of the chancery court, to earn and accumulate for her own

separate use, and where she has possessed property separately from her husband and not in connexion with him, and controlled it as in her separate and distinct right, and has shown that she had the means, aside from her husband, to have purchased, and her husband had no property and no means with which to procure it, the burden of proof, in our judgment, ought to be thrown from her, and cast upon those who assert the liability of the property to the husband's debts. The defendant has introduced no proof, conducing to show the falsity of the claim set up by Mrs. Pinkston; and we will treat the slaves Phil and Bella as her separate estate, the result of her own earnings.

5. But it is said that the original contract between Mrs. Pinkston and her husband was made with the intent to defraud the creditors of the latter. The proof shows that, in 1840, when the contract was made, the husband was embarrassed with a heavy indebtedness, and some contingent liabilities; but it does not show that, at that time, his property was insufficient, or appeared to be insufficient, for the payment of his debts. His credit is admitted to have been then good. Until 1845 or 1846, (five or six years afterwards,) money was collected from him by execution. He had, at the time of the contract, a valuable plantation, with more than fifty slaves; and it was not until five or six years afterwards that he incumbered his property with a mortgage; and it was not until 1852, about twelve years afterwards, that his property was sold to pay his debts. By the contract between Mrs. Pinkston and her husband nothing was diverted from the creditors, which would likely have existed and been liable to their debts. No property was conveyed to her, and that which was subjected to her use was not productive property. It consisted of the servants employed in and about the residence of the family. The arrangement simply converted into a separate estate for Mrs. Pinkston the income which she might create by her industry and skill in the management of so much of the labor of four domestic servants, as was not consumed in the service of the family. There is no certainty that any thing thus transferred to Mrs. Pink-

ston would ever have existed in a form to have benefited creditors but for the arrangement. We can not find in these circumstances evidence which will justify us in characterizing the contract as one fraudulent in intention. There is no proof that the object was to make Mrs. Pinkston the holder of her husband's money, or that she ever used any of his money, or any money derived from him, in any of her operations. If such facts existed, the defendant ought to have proved them.

The decree of the court below is reversed, and we proceed to render the decree which we think is the proper one in the case. It is ordered, adjudged, and decreed, that the complainant's bill stand dismissed, and the injunction be dissolved, as to the defendant Smith; that the defendant McLemore, as executor of Joseph Harper, be perpetually enjoined from the sale of the property levied upon by virtue of the executions described in complainant's bill, and from the levy by virtue of said executions, or any other executions upon the same judgment, upon the slaves Phil and Bella; that the complainant be denied any decree as to the other property mentioned in the bill, upon the ground that her separate right to the same has not been attacked or threatened; that the complainant pay one half, and the defendant McLemore the other half, of the costs in the court below; and that the complainant and defendant McLemore pay each one half the costs of this appeal.

REPORTS

OF

CASES ARGUED AND DETERMINED

At January Term, 1858.

McHUGH *vs.* THE STATE.

[INDICTMENT FOR MURDER.

1. *Impeaching witness.*—A witness for the prosecution may be impeached by proof of his hostility to the prisoner; and if he denies such hostility on cross examination, it may be established by proof of his previous acts and declarations.
2. *Dying declarations.*—A statement written by an attorney during the night on which the deceased died, held not admissible as the dying declarations of the deceased, when it appeared that the attorney propounded questions to him, which he tried to answer, but was unable to do so; that his attendant friends then "explained the questions to him, and made the answers, to which he assented only by nodding his head;" that the statement, consisting of the answers thus made, was, when finished, "read over to him by the attorney, slowly and distinctly, and he signified his assent thereto by nodding his head;" "that he spoke but a few words afterwards, and had frequently to be aroused; and that he seemed, while the statement was being read to him, to be in a stupor."
3. *Same.*—To authorize the admission of dying declarations as evidence, the State must first prove to the court the existence, at the time they were made, of that despair of life on the part of the deceased, which is naturally produced by an impression of almost immediate dissolution, and which the law deems equivalent to a sworn obligation.
4. *Same.*—It is not essential to the admissibility of dying declarations, when reduced to writing, and signed by the deceased, that a subscribing witness thereto should be produced, or his absence accounted for.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. McKINSTRY.

THE prisoner was indicted for the murder of William Toomey, a police officer in the city of Mobile, who was stabbed in the neck, in August, 1857, while attempting to quell an affray, and died on the 14th day afterwards. Of the several rulings of the court on the trial, to which exceptions were reserved by the prisoner, it is only necessary to notice the following:

"One P. D. Carr, a policeman, was offered as a witness for the State, and was asked, on cross examination, if he entertained any unfriendly feelings towards the accused; to which he replied, that he did not. He was then asked, if he did not say, at the mayor's office, in the presence of H. Maury, the city marshal, and others, that he would do all he could to have the accused convicted; and that he would give $500 to have had his pistol, that he might have killed the accused. No objection was made by the State to this question, or to the witness answering it; and the witness answered, that he did not make any such statements. The prisoner's counsel afterwards offered said Maury, the city marshal, and one Anderson, who was present at the time, to prove that said Carr did make such statements. The counsel for the State objected to the introduction of this evidence, because no sufficient predicate had been laid to authorize its admission. The court sustained the objection, and excluded the evidence; to which the prisoner excepted."

To prove the dying declarations of the deceased, the State offered in evidence a statement, which had been reduced to writing by C. F. Moulton, and which is appended as an exhibit to the bill of exceptions, marked "No. 1;" accompanied by the testimony of said Moulton, as follows: "That he was an attorney-at-law, an alderman of the city, and a peace officer; that he was requested by the mayor of the city, on the night before the death of the deceased, to call on the deceased, and to get his dying declarations; that he called accordingly about 11 o'clock that night, and found the deceased very low; that his physician, who, with several of his friends, was present, said that he was dying, and such was witness' opinion; that the deceased believed he would die; and that the

written statement marked 'No. 1,' was taken down in this way: Witness would put questions to the deceased, who would try to answer them, but could not, being unable to speak more than a few words at a time. The friends of the deceased, who were standing around his bed, would then explain the questions, and make the answers; the deceased would assent them, by nodding his head; and witness would then reduce them to writing. After they were all taken down, witness read over the statement, slowly and distinctly, to the deceased, who signified his assent by nodding his head. He was then raised up in bed; some one held his hand, and made his mark. He spoke but a few words afterwards, and had frequently to be aroused, and seemed to be in a stupor while it was being read over to him. He died the next morning." On this evidence the court permitted the said statement to be read to the jury, against the prisoner's objection; "telling the jury, that they had heard from the witness the manner in which it was reduced to writing, and that they must take it for what it was worth, together with the testimony of said witness." To this ruling of the court the prisoner reserved an exception.

The State offered in evidence, against the prisoner's objection, another written statement containing declarations made by the deceased, on the testimony of Thomas Buford, the coroner of the county, by whom it was reduced to writing, and who testified in relation thereto, "that he called on the deceased, the night before he died, to receive his dying declarations; that the deceased said, at the time said statement was reduced to writing, that his physician had told him he would die, and that he believed he would if there was no immediate change for the better; that he reduced the statement to writing, and signed the name of the deceased to it at his request; and that one Philips was called as a witness to the signing of the statement, and signed it as a witness." Philips, the witness referred to, whose name is subscribed to the statement, was not called as a witness to prove it, although it was shown that he was in the county. The prisoner's counsel objected to this statement being read in evidence against

him, "1st, because it was not made under a sense of impending death, and the deceased had hope of recovery at the time; and, 2dly, because the witness Philips was not called to prove said statement." The court overruled these objections, and permitted the statement to be read in evidence to the jury; and the prisoner excepted to its ruling.

DAN'L CHANDLER, for the prisoner.—1. The court erred in ruling out the testimony of Maury and Anderson. A sufficient predicate was laid for the introduction of the evidence, the attention of the witness having been called to the time, place and persons involved in the conversation referred to.—1 Greenl. Ev. § 462, note; 2 Brod. & Bing. 313; Nelson v. Iverson, 24 Ala. 9.

2. The written statement which was admitted in evidence on the testimony of Moulton, as containing the dying declarations of the deceased, ought not to have been received.—Barb. Crim. Law, 505; Rex v. Fitzgerald, Irish Cir. Rep. 168.

3. The statement proved by Buford was obnoxious to both of the objections urged against it. That the sense of impending death was not sufficiently proved, see Rex v. Woodcock, 1 Leach's C. C. 502; Rex v. Spitsbury, 7 C. & P. 187; Rex v. Crockett, 4 C. & P. 544; Rex. v. Haywood, 6 C. & P. 160; Barb. Crim. Law, 55, 504; 1 Greenl. Ev. §§ 158, 365; 3 C. & P. 598. That the attesting witness ought to have been produced, or an excuse shown for his absence, see 1 Greenl. Ev. § 569; 2 *ib.* § 158; 4 East, 54; 2 Stark. Ev. 263.

M. A. BALDWIN, Attorney-General, *contra.*

RICE, C. J.—In considering the various modes by which the credit of a witness may be assailed, courts must observe the distinction between an attack upon his *general credit*, and an attack upon his *credit in the particular case.* Particular facts cannot be given in evidence to impeach his *general credit* only, but may be to affect his *particular credit*—that is, his credit in the particular cause.

Thus, the *general credit* of a witness for the prosecution may be unassailable; he may be hostile to the prisoner, and, on cross examination, may deny that he is so; in such case, who can doubt the right of the prisoner to prove the hostility? Its existence is a fact which cannot be proved by general reputation. When the witness denies it, it is in its very nature incapable of being proved otherwise than by his previous acts and declarations. It ought to be made known to the jury, because they are to weigh the testimony, and to determine the credit to which each witness is entitled; and because as full belief will not be readily yielded to a witness who entertains hostility to the party against whom he is introduced, as to one who entertains no such hostility.—1 Greenl. on Ev. § 450; 1 Starkie on Ev. (edition of 1826,) 135; 4 Phil. on Ev. (edition of 1850, by Van Cott,) 750–752; Yewin's case, 2 Camp. 638; Rixey v. Baise, 4 Leigh, 330; Atwood v. Welton, 7 Conn. R. 66; Daggett v. Tallman, 8 *ib.* 168; Somes v. Skinner, 16 Mass. R. 348; Tucker v. Welsh, 17 *ib.* 160; Melhuish v. Collier, 15 Ad. & Ellis, N. S. 878. Entertaining these views, we hold, that the court below erred in excluding the evidence of the witnesses Maury and Anderson, as offered by the prisoner.

2. We are also of opinion, that the court below erred in admitting the statement marked No. 1, as the dying declarations of the deceased. That statement was taken down by an attorney-at-law, who states the reason why he took it down, the time when, and the way in which he took it, the attending circumstances, and the physical and mental condition of the deceased at the time. It was taken down after 11 o'clock at night, and the deceased died next morning. The mortal wound had been given some two weeks previously. At the time the attorney went to take the statement, the deceased was dying. He was unable to answer the questions put to him by the attorney, although he tried to answer them. His attending friends took upon themselves to "explain the questions and make the answers." The only assent he gave to the answers thus made by his friends, to the questions as explained by themselves, was "*by nodding his head.*"

The statement consists of the answers thus made by the friends of the deceased, and thus assented to by him. After the statement was thus written out, the attorney read it over slowly and distinctly to the deceased. The only assent given to it by the deceased was "*by nodding his head.*" "The deceased spoke but a few words afterwards, and *had frequently to be aroused*, and seemed, *while it was being read over to him*, to be in a *stupor*."

It is clear that the language of the statement is *not the language of the deceased;* and that the declarations contained in it are not his declarations, unless made so by his mere "nodding his head." If there was anything to convince us that he perfectly understood the language employed in the statement, or that he was at the time able to have detected any *erroneous inference* as to his real meaning, which his friends might have expressed in the answers given by them and embodied in the statement,—we should regard the assent given by nodding his head as sufficient. But we see nothing which satisfies us that he either perfectly understood the language, or was able to have detected *the erroneous inference* as to his meaning, which his friends may have honestly drawn in making the answers set forth in the statement. He was just in that condition, in which for the sake of peace, or to be rid of the importunity or annoyance of those around him, the probability is, he would assent to, or seem to say, whatever they might choose to suggest. Such an assent, obtained under such circumstances, by the friends on whom he relied,—not merely to a translation of language he himself had uttered to express his meaning, but to *their inferences* as to his meaning, couched in *their own language*, or in the language of the attorney who took down the statement,—cannot safely or legally be held sufficient to give to the statement thus assented to the force and effect of dying declarations, in a cause involving the life or liberty of a human being.—1 Greenl. on Ev. §§ 156, *et seq.;* see, also, authorities cited for the prisoner.

3. It seems to us that the evidence is not as full as it might be, in relation to the hope of recovery or despair of life on the part of the deceased, at the time he made

the declaration embodied in the statement written out by coroner Buford, and marked No. 2. For that reason, and the additional one that the judgment must be reversed for the errors already pointed out, we decline now to decide whether or not there was error in admitting those declarations. But we deem it proper to remark, that they are not admissible, unless the State first proves to the court the existence of that despair of life on the part of the deceased, at the time he made them, which the law deems equivalent to a sworn obligation; that despair which is naturally produced by an impression of almost immediate dissolution, a dissolution so near as to cause all motives to falsehood to be superseded by the strongest inducements to strict veracity.—3 Phil. on Ev. (edition of 1850, by Van Cott,) 251–255.

4. It is not essential to the *admissibility* of those declarations, that Philips, who signed his name as a witness to said statement No. 2, should be produced, or his absence accounted for.

For the errors above pointed out, the judgment of the court below is reversed, and the cause remanded; the prisoner must remain in custody until discharged by due course of law.

GODFREY (A SLAVE) *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Criminal responsibility of infant.*—An infant, between seven and fourteen years of age, is, *prima facie*, incapable of committing crime; but, if the evidence convinces the jury beyond a reasonable doubt, after allowing due consideration to his age, and to the additional fact that he is a slave, that he fully knew the nature and consequences of his act, and plainly showed intelligent design and malice in its execution, he may be convicted of murder.

From the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THE prisoner in this case, who was a slave belonging to Mrs. Margaret Stuart, was indicted for the murder of a child named Lawrence Gomez, whose nurse he was; the child being four years and eleven months old at the time of the alleged murder. The evidence adduced on the trial is thus stated in the bill of exceptions:

"——— testified, that he was near the house where the deceased lived, and, hearing screams there, went to the house; that the child was on the floor, all bloody; that he was cut on the face and head, three cuts, and a bruise as if with the head of a hatchet; that it was said there, that defendant had said an Indian had done it; that they hunted for Indians, but could not find any; that the child died; that this was all in Mobile county, on the 30th April, 1857; that he saw tracks, as if the child had been running, and had been dragged along on the ground; that the defendant was bloody, on his shoulder, and on the back of his legs and feet; that the child was wet with water; that there was a hogshead of water in the yard; and that a hatchet was found, which was wet, and as if washed.

"*Gomez*, the father of the deceased: Defendant was bought, about one year ago, for eleven years old. Believes that is his age. When witness reached home, the child was all wet; his brain was projecting from his skull; he was cut in three places on the head, one on the back, one on the side, and one on the face, of which wounds he died. There were two young Indian boys staying with Lawrence Broux, some 200 or 300 yards from the house of witness; they were never at witness' house before the killing; they came to see the child.

"*Jules Lenoir*: Knew Godfrey; saw him on the day the child was killed, and on the day before; he was flying a kite, which fell in witness' garden, and he came into the yard to get it. When they had gone out, the child tried to take the string; Godfrey threw brick-bats at him, and knocked him down; and witness then went out, and made him go off. Godfrey said, he would kill him any way. On the day of the killing, witness heard a cry at the house of Gomez, and went over there; saw blood in the yard,

near the gate, and a trace on the ground as if a body had been drawn along on it; saw the hogshead of water; went into the house, and saw the child, (describing it as before;) and saw a hatchet that had some blood on it. Defendant had blood on his shirt, pantaloons, and feet. There were no Indians about there, except at the house of Broux. Godfrey was in a passion when he said he would kill the child. When witness went to the house of Gomez, all the witnesses now here were there; saw the hatchet wet; the child was wet all over; the defendant was wet on the legs.

"*Lawrence Broux:* Had two little Indian boys living with him, who were with him when he heard the screams at the house of Gomez, and had been with him all the morning. Heard Mrs. Gomez screaming, 'My child is dead,' and ran over there. Defendant said, that an Indian had done it. Witness asked him where the Indian was; and he replied, that 'he was a man and ran that way,' pointing. Saw the axe; no blood on it, except at the eye. Saw the child, (described as before,) the blood in the yard, and where it appeared as if the body had been drawn on the ground. Defendant is a smart, intelligent boy; 'heap smarter than boys of twelve years generally are.' Defendant said that the Indian ran into the yard where the wood-pile was, and took the axe and killed the child.

"*Juzan* testified like the others; except that he said, he heard the child cry out, and crying as if he was moving from one place to another while crying.

"*Joseph Broux:* Is thirteen years old. Knew Godfrey and the child Lawrence, and often played with them. On the day of the killing, in the evening, Godfrey said, that he had killed Lawrence because he had broken his kite, and he would do it again if they did not hang him.

"*Calderon:* Heard Lawrence crying, but was busy, and did not look until he heard Mrs. Gomez cry out, when he went over to the house. (Testified as the others had done, except that he saw Godfrey and Lawrence together shortly before.) Godfrey said, that an Indian had killed him with a hatchet.

"*Mrs. Gomez*, the mother of the deceased child, testified, that the defendant had care of the children; that she had gone across the street to visit a neighbor, and had left the deceased with the defendant; that she had been gone but about five minutes, when she heard screams, and Godfrey came to her, saying that Lawrence had been saucy to an Indian, and that the Indian had killed him with an axe, and had left him in the gutter by the side of the road; that she went home, and found the child in the yard, lying near by a barrel of water, and in the condition described by the other witnesses.

"*Wm. Sampson*, on the part of the defendant, testified, that the boy had been a good deal at his house, but not within the past two years and six months; that he thought his disposition was kind and gentle, and that he was about ten years and six months old. Some of the witnesses testified, that he was very smart of his age. It appeared, also, that no Indian had been about there on that day, except the boys of Broux.

"*Mrs. Cox* testified, that she had owned the boy, and sold him to Mrs. Stuart, the grandmother of the deceased, about one year ago; that he is ten or eleven years of age in July, 1857; that he was the nurse of her child; that she never saw anything unkind from him to the child; that she never saw any bad temper about him; and that he did not seem to be very smart, but about as boys usually are.

"The court charged the jury, among other things, that if they were satisfied that the defendant was the guilty agent, and that the charge was established as alleged in the indictment, they must ascertain whether the defendant was of sufficient age and intelligence to be capable of committing the offense, and to be held accountable for his acts; that no one under the age of seven years should be held responsible for the commission of a felony; that from seven to fourteen years of age, the presumption was that a child had not sufficient discretion or judgment to be held accountable for his acts, when charged with a felony, but that this presumption might be rebutted by evidence; that they must take into consideration his con-

dition as a negro and a slave, with all the evidence in the case; and that unless [they were satisfied from the evidence] that he was fully aware of the nature and consequences of the act which he had committed, and had plainly shown intelligent malice in the manner of executing the act, they should render a verdict of not guilty; but if, on the whole evidence, they were satisfied beyond a reasonable doubt that he was fully aware of the nature and consequences of the act which he had committed, and had plainly shown intelligent design and malice in its execution, they would be authorized to return a verdict of guilty."

The jury returned a verdict of "guilty as charged in the indictment;" but the presiding judge, being in doubt as to the propriety of passing sentence under the circumstances of the case, reserved the question for the decision of the appellate court. By consent of the attorney-general, entered on the transcript, the cause was considered as regularly before the appellate court by writ of error, and as if an exception had been reserved by the prisoner to the charge of the court.

WALKER, J.—The single point to be considered in this case is, whether the charge of the court below to the jury was correct. An analysis of that charge shows that the jury were distinctly instructed, that the defendant, being between seven and fourteen years of age, was, *prima facie*, incapable of committing crime; that to overturn the intendment in favor of his incapacity to commit crime, the jury must be convinced from the evidence beyond a reasonable doubt, after allowing due consideration to the fact that the accused was a negro and a slave, that he knew fully the nature of the act done, and its consequences; and that he showed plainly intelligent design and malice in the execution of the act. This charge, after anxious and careful examination of it, we can not pronounce erroneous.

An infant, above seven, but under fourteen years of age, is presumed not to have such knowledge and discretion, as would make him accountable for a felony committed

during that period. But, if that presumption is met by evidence clearly proving the existence of that knowledge and discretion deemed requisite to a legal accountability, the reason for allowing an immunity from punishment ceases, and, with it, the rule which grants such immunity ceases. There are many cases where children between those ages, being shown to have been cognizant of the criminal nature of the act done, have been punished under the criminal law. A girl, thirteen years of age, was executed for killing her mistress. Two boys, one nine, and the other ten years of age, were convicted of murder, because one of them hid himself, and another hid the dead body; thus manifesting, as was supposed, a consciousness of guilt, and a discretion to discern between good and evil. A boy of eight years of age, who had malice, revenge, and cunning, was hanged for firing two barns. A boy ten years old, who showed a mischievous discretion, was convicted of murdering his bed-fellow. 4 Bla. Com. 23–24.

In the case of Rex v. Owen, 2 Car. & P. 236, it was referred to the jury, to determine whether the act of a girl ten years old, alleged to constitute a larceny, was known by her to be wrong when it was done; and, upon that question, she was acquitted. It is said in Hale's Pleas of the Crown, page 22, that one between the ages of seven and fourteen might be convicted of a capital offense, "if it appeared by strong and pregnant evidence and circumstances that he was perfectly conscious of the nature and malignity of the crime." In an American case the same principle is thus stated: "If it shall appear by strong and irresistible evidence that he had sufficient discernment to distinguish good from evil, to comprehend the nature and consequences of his acts, he may be convicted, and have judgment of death."—State v. Aaron, 1 Southard, (N. J.) R. 231. In that case, a negro boy, who was a slave, of eleven years, was convicted of murder; but a new trial was granted on account of an erroneous ruling as to the competency of a witness, and it does not appear what farther was done in the case.

In the case of the State v. Guild, 5 Halst. 163, a negro

slave, of less than twelve years, was convicted of murder; and the report of the case informs us, that the defendant was executed. In that case, the court, dissenting from the cautious statement of the law found in Hale's Pleas of the Crown, (vol. 1, p. 27,) permitted a conviction upon confessions. In this case, although a confession was given in evidence, the facts proved established the guilt of the accused so clearly, that it is fairly inferrible that no importance was attached to it by the court or jury, and its effect is not noticed in the charge. The question, whether a conviction could be had upon confessions, does not arise, and we do not commit ourselves to the doctrine of the decision last above cited upon that point.

All the authorities concur in maintaining the correctness of the propositions of law involved in the charge.—Bishop on Criminal Law, §§ 283, 284, 285; 1 Archbold's Crim. Pl. 3, 4, and 5, and notes; 1 Russell on Crimes, 3, 4, and 5; Roscoe's Crim. Ev. 942, 944; Wharton's Am. Crim. Law, 51; 1 Wheeler's Crim. Cases, 231 to 234. Reason, humanity, and the law, alike required that the court should, in its charge, throw around the jury every guard and restriction necessary to prevent an improper conviction in such a case. This has been carefully done by the court in this case, and we are bound to pronounce a full approval of the charge.

The judgment of the city court is affirmed, and its sentence must be executed.

CORBETT *vs.* THE STATE.

[INDICTMENT FOR LARCENY FROM STOREHOUSE.]

1. *Larceny of bank-bills.*—Bank-bills may be the subject of larceny from a storehouse, under section 3170 of the Code.
2. *Proof of genuineness and value of foreign bank-bills.*—A conviction cannot be had for the larceny of foreign bank-bills, without proof of their genuine-

ness and value; yet these facts may be established, without the production of the act of incorporation, or proof of the handwriting of the bank's officers, by the testimony of the person from whom they were stolen, to the effect that he received and passed them in the course of trade at their nominal value, and the testimony of others that such bills circulated as money in the community; and this proof being made, the genuineness and value of the bills should be submitted to the decision of the jury.

3. *Charge invading province of jury, or calculated to mislead them.*—A charge to the jury in a criminal case, ignoring a material fact as a constituent of the prisoner's guilt, or asserting that certain facts, hypothetically stated, would make out a *prima-facie* case against him, is erroneous.

4. *Effect of prisoner's declarations as evidence.*—When the prisoner's declarations have been adduced in evidence by the State, it is his right to have the entire conversation laid before the jury, and duly considered by them; yet it does not follow, "that the declaration so adduced in evidence must be taken as true, if there was no other evidence in the case incompatible with it."

From the Circuit Court of Perry.

Tried before the Hon. C. W. RAPIER.

THE prisoner was indicted for the larceny of a "one-dollar bill of the Bank of East Tennessee, of the value of one dollar, and a ten-dollar bill of the Bank of Middle Tennessee, of the value of ten dollars;" alleged to have been the personal property of one William W. Spalding, and to have been stolen from a storehouse. The rulings of the court on the trial are thus stated in the bill of exceptions:

"The State introduced William W. Spalding as a witness, who testified, in substance, that about the 1st April, 1857, he left his pantaloons in the back room of his storehouse in Marion, at night, his pocket-book being in the pocket thereof; and that said pocket-book contained from twenty to thirty dollars in money, and in it were two bills, a one-dollar bill on the Bank of East Tennessee, and a ten-dollar bill on the Bank of Middle Tennessee. The prisoner, by his counsel, objected to the witness speaking of the contents of said bills, and insisted on their production; and asked the witness if he had them. The witness answered, that he did not have them; that he had kept them for some time, but was told by the solicitor of the circuit that he need not keep them, and could pass them off if he desired; that he had passed them off, and did not

know where they then were; and that he had passed the ten-dollar bill to a citizen of Marion. The defendant insisted upon his objections; the court overruled each one of the objections, and allowed the witness to speak of the contents of said bills without requiring their production; and the defendant excepted.

"The witness then proceeded to state the contents of said bills, as follows: That the bills spoken of by him were on the Bank of East Tennessee and the Bank of Middle Tennessee, and were bank-bills of the denomination above stated. The solicitor having asked him the value of said bills, he replied, that he did not know their value in any other way than that he received and passed them off, in the course of trade, for the amounts expressed on their face; and that, though such bills did not pass very readily in the community, yet they were so received and passed. The defendant objected to this evidence as to the value of said bills, and excepted to the action of the court in overruling his objection.

"The witness further testified, that, at the time he so left his pantaloons in the back room of his store, defendant was in his employment as a journeyman tailor, lived with him, and worked in said back room; that the defendant had charge of the store, and of the goods therein, at night, and authority to dispose of the same, in the day or night, in the absence of witness and his regular salesman; that another journeyman tailor, by the name of Dyer, was also in his employment at the same time; that said defendant, Dyer, and some other persons, were in said room when he left it that night; that when he first missed his money, he believed that said Dyer had stolen it, and took steps to detect him; that for this purpose he apprised defendant of his loss, who, on his request, agreed to aid him in his efforts to detect Dyer as the thief; that defendant, one or two days after the theft, showed him a one-dollar bill which he said Dyer had let him have, but which witness did not recognize as any part of the money lost; that said Dyer disappeared, by night, some three or four weeks after the theft, and witness had not seen or heard of him since; that the defendant was arrested three or

four weeks after the theft, and, on being searched, said bank-notes above described were found in the watch-pocket of his vest, which was sewed up; that witness recognized said bills, on being taken from the defendant, as a part of the money which he had lost; that the defendant also had in the pocket of his pantaloons a five-dollar gold piece, which witness had let him have, and two or three dollars in specie, loose in his pocket, but had no purse or pocket-book at the time; that he told witness, when he was arrested, that he had found said ten-dollar bill on the settee in said back room, and supposed it to belong to a Mr. Horne, who (witness stated) was in said back room about the time of the loss of said money, or within a few days of it, and had bought a suit of clothes; and that he could not identify said one-dollar bill with any degree of certainty, but recollected said ten-dollar bill very well from some marks thereon.

"The witness further testified, on cross examination, that he had employed defendant, in New York, to come out south and work for him as a journeyman tailor, and to make himself generally useful about his store; that he learned, on inquiry in New York, that the defendant was an industrious workman; and that during the six months defendant had here worked for him, preceding his arrest, he had been industrious and attentive to business. Further, that he did not know that either of said Tennessee banks was incorporated, or authorized to issue bank-notes such as the two taken from the defendant's pocket; that he did not know where either of said banks was located, was not acquainted with the president, cashier, or any other officer of either one of them,and did not know the handwriting of either of them; that he did not know whether either one of said bills was genuine or not, or put in circulation by any lawful authority; that he knew nothing about their being genuine, and could not say that either one of them was genuine; that he only knew their value from having received and passed them as money; that it was customary with banks to issue their notes so as to read, 'The president and directors of the bank promise to pay,' &c.; that he could not say whether said

bills were so issued or not; that the only words he could recollect on the one-dollar bill were, 'Bank of East Tennessee' and the figure 1, and on the other, 'Bank of Middle Tennessee' and the figure 10, with the names of a president and cashier on each, which he could not recollect. The defendant again moved the court to exclude all that the witness had said about the contents of said bank-notes; the court overruled the motion, and the defendant excepted.

"Thomas G. Clancey was then called as a witness by the State, and testified to the finding of said bank-bills on the defendant's person as stated by Spalding; also, that he was engaged in business in the town of Marion about the time said money was lost, having a blacksmith-shop; and that he had seen notes of the bank of Middle Tennessee circulating as money in the community. The defendant objected to the admission of this last evidence, as to the witness seeing the notes spoken of by him in circulation; but the objection was overruled, the evidence admitted, and the defendant excepted. Said witness testified, on cross examination, that he had not seen the notes described in the indictment in circulation, and knew nothing about their circulating further than that such notes were in circulation in the community as money, and knew nothing about their being genuine.

"The defendant proved by the witness Spalding, on cross examination, that said Dyer had been in his employment for some considerable time; that he had had a settlement with him on the day after said money was lost, and fell in his debt between one and two dollars, which he paid; and that said Dyer had no other money or means within his knowledge. He also proved, by one Tuomey, that said Dyer, on the night when he was last seen in Marion, had paid him five dollars, for cigars and other articles bought from him; and, by one Womble, that on leaving his boarding-house, when about to leave the town, he paid about five dollars more to his landlord. Said Spalding also testified that, among the bills in his pocket-book which was lost, were two five-dollar bills, and two or three one-dollar bills.

"This was the substance of all the evidence; and thereupon the court charged the jury, amongst other things,—

"1. That if the defendant feloniously took and carried away the one and ten-dollar bills described in the indictment, from a storehouse as alleged in the indictment; and that this was done in the county of Perry, within three years before the finding of the indictment; and that said notes were any value,—then the defendant would be guilty as charged in the indictment.

"2. That in determining whether said notes were of any value, the jury might look to the evidence of their being received and passed as money in the course of trade, and to the evidence in reference to such notes circulating in the community as money.

"3. That if said notes purported on their face to be bank-bills, and were received and passed as money in the course of trade; and if like notes were at that time circulating in the community as money,—this would be *prima-facie* evidence of their genuineness, and that they were issued by a bank having authority to issue them.

"The defendant excepted to each of these charges, and then requested the court to instruct the jury as follows:

"1. That if the State had introduced in evidence the declarations of the prisoner, then the whole of the declarations must be taken together, and the State could not select one part and leave another; and, if there was no other evidence in the case incompatible with it, the declaration so adduced in evidence must be taken as true.

"2. If the jury find from the evidence that the articles alleged to be taken were two bills, or pieces of paper, on one of which were the words 'Bank of East Tennessee' and the figure 1, and on the other, 'Bank ofMiddle Tennessee' and the word or figure 10, and some names on the last for president and directors; and there was no evidence before them that said bills were genuine,—then they must find the defendant not guilty.

"3. That unless the jury believe, beyond a reasonable doubt, that the defendant, and not Dyer, took the money charged to have been stolen, they must find him not guilty.

"4. If the jury find that there is no proof of the gen-

uineness of the identical bills alleged to have been stolen, and no evidence of their currency except the fact that Spalding received and passed them off as money; and that there is no other evidence of the value of these identical bills than that above stated; and that the only evidence as to the value of these bills was that of Spalding, who testified that he could not say that they were of any value apart from his receiving and passing them as money,—then they must find the defendant not guilty.

"5. That the jury, before they can find the defendant guilty, must be satisfied beyond a reasonable doubt that the bank-bills alleged to have been stolen were genuine.

"6. That the jury, before they can find the defendant guilty, must believe that the bills alleged to have been stolen were issued by a corporation having legal authority to issue such bills, and that said bills were genuine.

"7. That before the jury can find the prisoner guilty, the facts and circumstances must be so strong and conclusive, as to exclude from their minds every hypothesis or supposition *inconsistent* (?) with his innocence.

"8. That if there is no evidence in the case, tending to show that the bills charged and set forth in the indictment were genuine, they must find the defendant not guilty.

"The court refused each one of these charges, and the defendant excepted to each refusal. The court had already instructed the jury, before the defendant asked these charges, that they should not find the defendant guilty, unless they should believe him to be guilty, beyond a reasonable doubt, from the evidence, and in view of the instructions of the court; and afterwards further instructed them, that before finding the defendant guilty, the facts and circumstances shown by the evidence must be such as to lead their minds to the belief of his guilt, and so pointedly as to exclude every reasonable conclusion to the contrary."

I. W. Garrott, for the prisoner.—1. The indictment was framed under section 3170 of the Code, which creates a new offense, and attaches to it a severer penalty than is

attached even to grand larceny. The word *larceny*, as used in this statute, is not defined by the statute itself, nor is it explained or controlled by any other provision of the Code; consequently, the word must be taken in its common-law sense, which did not include the stealing of bank-bills.—Culp v. The State, 1 Porter, 33; 2 Russell, 72; Roscoe, 624; Spencer v. The State, 20 Ala. 29; Murray v. The State, 18 Ala. 729.

2. Secondary evidence of the contents of the bills alleged to have been stolen, ought not to have been admitted. The bills were not lost, mislaid, or destroyed by accident, but were put out of the way by the advice of the State's counsel.—1 Phil. Ev. 422; Part II Cowen & Hill's Notes, (old edition,) 1216; 2 Archb. Crim. Law, 390, 394, note.

3. The witness Spalding ought not to have been allowed to testify at all to the contents of the bills, because he could only recollect a small portion of their contents. The same rule, it is insisted, applies in this case, as in all other cases where an admission, confession or statement is offered in evidence.—Roscoe, 55; Chambers v. The State, 26 Ala. 59.

4. The testimony of Clancey, as to the currency of other bills, was improperly admitted.

5. The first charge given excluded from the consideration of the jury the question whether the bills were the property of Spalding, as alleged in the indictment.—Ogletree v. The State, 28 Ala. 693; Martha v. The State, 26 Ala. 72.

6. The second charge makes the value of the bills depend, not on their genuineness, but on the fact that they were received and passed as money.

7. Neither one of the three grounds on which the third charge makes the presumptive evidence of the bills depend, is tenable.

8. The correctness of the first charge asked and refused is sustained by Roscoe's Criminal Evidence, 55.

9. That proof of genuineness was indispensable to a conviction, as asserted in the 2d, 6th, and 8th charges,

see Ogletree v. The State, 28 Ala. 693; 4 Denio, 364; 12 Wendell, 547; 1 Porter, 125; 3 Har. (N. J.) 563.

10. That the evidence of the genuineness of the bills was insufficient, as asserted in the 4th charge asked, see 4 Denio, 364; 12 Wendell, 547.

11. That the charges asked, relative to the doctrine of reasonable doubt, were correct, see 3 Greenl. Ev. § 29, note 2; Mickle v. The State, 27 Ala. 20; Ogletree v. The State, 28 Ala. 693.

M. A. Baldwin, Attorney-General, *contra*.—1. The rule which requires the production of written instruments, before secondary evidence of their contents can be received, has no application to the case. It was no more necessary to produce the stolen bank-bills, than it would be to produce any other article stolen; the identity and value of either may be proved without its production. Moreover, a sufficient predicate was laid for the introduction of secondary evidence.—Wade v. Work, 13 Texas, 482; 16 U. S. Digest, 273, § 20.

2. To determine the value of the bank-bills, the jury might look to the fact that they were received and passed as money in the course of trade; and the fact that they so circulated would be presumptive evidence of their genuineness, and that they were issued by banks having authority.—Johnson v. People, 4 Denio, 368; State v. Smart, 4 Rich. 364.

3. The stealing of bank-bills is larceny, as denounced by section 3170 of the Code.—Greeson v. The State, 5 How. (Miss.) 38; United States v. Moulton, 5 Mason, 553; Williams v. The State, 19 Ala. 15.

4. The defendant cannot insist on having his charges given in the language in which they are asked, unless they are in writing; and, even then, the court may explain them.—Code, § 2355; Morris v. The State, 25 Ala. 57.

5. The 5th charge asked, without qualification or explanation, was confused, and calculated to mislead the jury.—Cochran v. Moore, 1 Ala. 423; 28 Ala. 83.

STONE, J.—In Culp v. The State, 1 Porter, 33, it was declared, "that at common law, a chose in action is not the subject of larceny." In the same case it was said, that bank-notes were not within the purview of the act of 1807, which provided for the punishment of larceny of *promissory notes*. It was not in terms said that bank-bills are not personal property, but that was the effect of the decision. Thornton, J., who delivered the opinion of the court, offered neither argument nor authority in support of it..

Under the rules of the common law, it will be remembered, that only *personal goods* can be the subject of larceny. Since the introduction and use of bank-bills as a circulating medium, the question of their classification has frequently been mooted. The various decisions on this question can not be reconciled. In form, they are choses in action; while in their uses and effect, they supply the place of money. They are even a good tender as money, unless objected to on that account. Some courts have held, that they may be the subject of common-law larceny; while others have decided differently.—See the authorities collected in Bishop's Cr. Law, §§ 219, 220, and notes. Even this vigorous author, Mr. Bishop, does not assert it as an undisputed proposition, that current bank-bills are not embraced in the term personal chattels.

Long after the decision in Culp's case, the question came before this court, to what extent can current bank-bills be considered as money? Judge Ormond, in an able opinion, after asking the question, "what is entitled to be considered money," used the following language: "In the present highly commercial condition of society, and under the influence of the credit and banking systems, which, by excluding the precious metals from general use, has made the paper which occupies its place the actual medium of exchange, and the representative of the labor and property of the country, it would be strange if the executive officers of the law had not power to receive it in payment of a judgment. The commercial character of the age has silently produced a change in our language. No one is misunderstood, or suspected of telling a falsehood, when he speaks of having money in his possession,

though it consists entirely of bank-notes. It has worked a corresponding change in the common law, accommodating itself to the altered condition of society. In the great case of Miller v. Race, 1 Burr. 457, which was trover for a bank-note which had been stolen, and which came to the possession of the defendant for a valuable consideration, and without notice of the robbery, Lord Mansfield said, that bank-notes 'were as much money as guineas themselves are, or any other current coin that is used in common payments as cash or money.' So they are a good tender, unless they are objected to at the time. Under the term *money*, in a will, bank-notes will pass."—Haynes v. Wheat & Fennell, 9 Ala. 239. It was held that, although the sheriff had authority to receive only *money* in payment of an execution, and the plaintiff could require of such sheriff coin; yet, if the sheriff received from the defendant current bank-bills which were circulating as money, and returned the execution satisfied, he thereby discharged the defendant from the payment of the debt, and fixed a liability for the same on himself and sureties.

In the case of the United States v. Moulton, 5 Mason, 537, the defendant was indicted for taking and carrying away, with intent to steal and purloin, certain bank-bills, the personal goods of another. Judge Story, in an elaborate opinion, held, that bank-bills were personal goods, and the subject of larceny.

In Rex v. Mead, 5 Car. & Payne, 535, (S. C., 19 Eng. Com. Law, 514,) the same doctrine was asserted.

In Greeson v. The State, 5 How. (Miss.) 33, it was held, that bank-bills are the subject of larceny, and are well described by that style.

The above array of highly respectable authorities are strongly persuasive to show that bank-bills are personal chattels, and have an intrinsic value.

But, independent of authority, we think the argument is decidedly in favor of this view. True, they are not, technically, money. They can not be made a legal tender in payment of debts. But they are more than simple choses in action. They furnish a standard of value in the commerce of the world. They pass from hand to hand

without endorsement; are alike available in the hands of each and every holder, and are not subject to defenses of payment, discount, and set-off, as choses in action generally are. After they are redeemed, they may be again put in circulation, and, on each re-issue, are as binding as when first issued.

The above are properties, not of choses in action, but of a circulating medium. They prove that bank-bills, which are the issue of banks not entirely insolvent, which are genuine, and whose circulation is not prohibited by statute, have an intrinsic value, and are strictly personal goods. We hold, that they may be the subject of larceny under section 3170 of the Code.—See, also, Crane v. Freeze, 1 Harr. 305; Dolby v. Mullins, 3 Humph. 437; Steele v. Brown, 2 Virg. Cas. 246; Means v. Vance, 1 Bailey, 39; McGee v. Cherry, 6 Geo. 550; Turner v. Fendall, 1 Cranch, 117; Brooks v. Thompson, 1 Root, 216; Prentiss v. Bliss, 4 Verm. 513.

We think there was no error in permitting the witnesses Spalding and Clancey, to speak as they did of the bank-bills alleged to have been stolen. It is true that, to justify a conviction, it was necessary to prove that the banks had a legal existence, and that these notes were issued by them. Their value depended on this. Yet the production of the act of incorporation, and proof of the hand-writing of the officers, was not the only mode by which these facts could be established. If such were the rule, there could rarely be a conviction for larceny of bank-bills issued in another State. Another reason: Few business men, in this banking age, take note of the particular bank whose bills they hold; suppose the thief should secrete or make way with the stolen bills; the rule contended for would necessarily lead to an acquittal, in almost every case.

The questions, whether the notes were genuine, and of value, were for the jury; and we think there was enough evidence in this case, to justify the court in submitting its effect to that body.—See on this point, Johnson v. The People, 4 Denio, 364; The State v. Smart, 4 Rich. Law R. 356; U. S. v. Holtzclaw, 2 Hayw. 379; Barnum v.

Barnum, 9 Conn. 242; Commonwealth v. Smith, 6 Serg. & Rawle, 568.

The first and third affirmative charges are erroneous. The first ignores the question of property in Spalding, and the third declares that certain hypotheticated facts would make a *prima-facie* case. The evidence should have been left to the jury for their determination, under an appropriate charge. It was not of that character which authorized the court to pronounce on its sufficiency, however the jury might view it.—Ogletree v. The State, 28 Ala. 693.

It was certainly the right of the defendant to have the jury instructed on the measure of proof necessary to his conviction. The rule is correctly laid down in Mickle v. The State, 27 Ala. 20; Ogletree v. The State, *supra*.

We do not subscribe to the doctrine, to the extent it is asserted in the first charge asked by defendant, and refused by the court. That proposition was asserted in the case of the King v. Jones, 2 Car. & Payne, 629; but we think it is well calculated to mislead a jury. We do not deny the doctrine, that when a confession is given in evidence against a defendant, it is his right to have the whole conversation laid before the jury, and considered by them. It does not follow, however, that "if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true." The declaration or confession may be incompatible with itself, or may be so unreasonable, as to tax credulity too far.

We hold, that the defendant has all his rights, in this connection, when the entire conversation is laid before the jury, and they are instructed to give it a fair and unprejudiced consideration. Of course, that body will not, and should not without reason, believe that portion which makes against the prisoner, and reject all which favors his innocence.—See Phil. Ev. (edition by Van Cott,) part I, pp. 421, 422.

On another trial, it would be well for the prosecution to trace the bank-bills as far as they are traceable, before offering secondary evidence of their contents. We do not,

however, announce this as a legal necessity, but withhold our opinion upon this question.

Judgment of the circuit court reversed, and cause remanded. Let the prisoner remain in custody, until discharged by due course of law.

CHANEY *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Pending causes not governed by provisions of Code.*—In a criminal case which was pending when the Code went into effect, and which is expressly exempted from its provisions by section 12, the prisoner's right to a copy of the *venire* must be determined by the former law.
2. *Prisoner's right to copy of venire.*—Under the law existing before the adoption of the Code, (Clay's Digest, 459, §§ 53, 54,) a person indicted for a capital offense, if in actual confinement, was entitled to have a list of the jurors specially summoned for his trial, not including the regular jurors for the week or term, delivered to him two entire days before the trial; and if a copy of the entire *venire*, including both the jurors regularly and those specially summoned, was thus delivered to him, he could not have the whole *venire* quashed, nor refuse to proceed with his trial, on account of any defect in the summons of one of the regular jurors.
3. *Declarations of prisoner not admissible evidence for him.*—The acts or declarations of the prisoner are not admissible evidence for him, unless they occurred within the period covered by the criminating evidence, or tend in some way to explain some fact or circumstance proved against him, or to impair or destroy the force of some evidence for the prosecution.

From the Circuit Court of Franklin.

Tried before the Hon. ROBERT DOUGHERTY.

THE prisoner, Robert R. Chaney, was indicted, jointly with one David B. Chaney, as an accessary before the fact, for the murder of David N. Martin by one Christopher Price; but was tried separately. The indictment was found at the September term, 1851, of the circuit court of Lauderdale. The case was removed by the defendants to Franklin county, where a trial was had at the October

term, 1857. On the trial of the prisoner, a bill of exceptions was reserved by him, which states the following facts:

"On Wednesday of the first week of the term, the solicitor moved the court for an order, setting a day for the trial of the defendants, and the summoning of a jury to try them. The court thereupon asked the counsel for the defendants, what number of jurors they desired to have summoned; and they replied, that they desired to have one hundred, the largest number allowed by law. The court then inquired of the clerk, how many jurors had been summoned for the regular panel for the second week; and the clerk having informed the court that thirty jurors had been summoned on said regular panel, the court thereupon made an order, directing the sheriff to summon seventy *tales* jurors, in addition to the regular panel summoned for said second week; and that the prisoners, as well as their counsel, be served with a copy of the same, including the regular panel, two entire days before the next ensuing Monday, which was the day set apart for the trial. In compliance with this order, the sheriff summoned seventy *tales* jurors, and served upon the prisoners' counsel, two days before the day set for the trial, a list of one hundred jurors, as the jury summoned for the trial of said cause, and made his return to the court of said regular and special *venire*. When the cause was called for trial, and the State had announced itself ready, the defendants moved to quash and set aside said *venire;* and, as ground for said motion, produced and exhibited to the court the *venire* of the regular panel for said second week, with the sheriff's return thereon, showing that he had executed the same on all the persons therein named except Thomas B. Jenkins and Henry Gargess; and further proved, that said Jenkins and Gargess, whose names were included both in the regular and in the special *venire*, had not been summoned at all, either under the regular *venire*, or under the special *venire*. On these facts, the defendants moved to quash said *venire*, because the said order of the court had not been complied with; but the court overruled the motion, and the defendants excepted. The defendants then objected to proceed-

ing further with their trial under said *venire;* but the court overruled their objection, and they excepted.

"The defendants were then, by agreement, ordered to be tried separately. On the trial of said Robert R. Chaney, when the names of the jurors were being put in the hat, the court proposed to direct the clerk to put in with the others the name of said Gargess, who had been sworn as a juror on the regular panel, and had been notified to appear as a juror for the week, by a written notice left by a deputy sheriff at his house; and who was present in court. The defendant objected to this, and thereupon the court directed the clerk not to put in the names of said Gargess and Jenkins; and neither of said names was put in, but only the names of the ninety-eight jurors who were summoned.

"It was proved on the trial, on cross examination of one Wilson Whitsett, a witness for the State, that some month or two after the April term, 1851, of the circuit court of Lauderdale, the defendant came to his shop, and had a conversation with him; that defendant said in this conversation, that if it had not been for him (defendant), Christopher Price would have killed said David Martin before that; that witness, in reply to this remark, said, 'Why, have you seen Christopher Price?' to which defendant replied, 'No, I have not seen him; but he has been lying out in the hills, and has been fed by his sister, who told me that he had said he would kill Martin; and I sent him word, by his sister, not to do so, as I was already under bond, and, if Martin was killed, it would go go hard with me.' It had previously been proved, that Price had fled; and that defendant had been arrested at Martin's instance, and bound over on a charge of stealing Martin's money. The defendant then proposed to prove, by the sister of said Price, that he did send said message to Price by her, when she told him what Price had said; but the court refused to allow him to make said proof, and defendant excepted."

William Cooper, for the prisoner.

M. A. Baldwin, Attorney-General, *contra.*

RICE, C. J.—As this prosecution was commenced before the Code went into effect, the questions presented must be determined, not by its provisions, but by the law which was of force when the indictment was found. Hiscox v. Hendree, 27 Ala. R. 216; Doe, *ex dem.* Kennedy v. Reynolds, *ib.* 364; Frankenheimer v. Slocum, 24 *ib.* 373; Code, §§ 12, 14.

2. By that law, a person indicted (as in this case) for an offense which may be punished capitally, if in actual confinement, was entitled to have delivered to him, two entire days before his trial, not a list of the *regular juries* for the week or term, but a list of the jurors specially "summoned for his trial." The regular juries were summoned for the trial of causes indiscriminately; not for his trial, nor for any other particular trial. *In addition to them*, the court was required to cause the sheriff to summon "for his trial" such number of other persons as, with the regular juries, would amount to not less than fifty, nor more than one hundred. From the additional jurors thus summoned, and the regular juries, the jury to try him was to be drawn in the mode pointed out in the statute. But it was only as to *the additional jurors* specially "summoned for his trial," that the right to a list was given.—Clay's Digest, 459, §§ 53, 54. And it was because that right was impaired and assailed by the action of the court in the case of Parsons v. The State, 22 Ala. Rep. 50, that the judgment therein rendered by the court below was reversed.

But, in the present case, that right has not been assailed or impaired by the action of the court. Here the requisitions of the statute have been complied with. The defendant was duly furnished with a list of all *the additional jurors*—the jurors summoned for his trial. All of them were summoned, and seem to have been in attendance. His complaint is as to one or two *regular jurors*, and rests upon the assumption, that he had *a right* to a list of them. He had no such right. If he obtained a list of them, that cannot *create* for him a right which the law did not confer. Our conclusion is, that the court did not err in its rulings

as to the motion to quash the *venire*, and as to the objection to proceeding with the trial.

3. On the trial, the defendant offered to prove, by the sister of Christopher Price, that when she told the defendant that said Christopher Price had said he would kill Martin, the defendant sent said Christopher word, by his sister, not to do so, as he (defendant) was already under bond, and if Martin was killed, it would go hard with him, (defendant). It had been previously proved, that Price had fled; and that defendant had been arrested, at Martin's instance, and bound over on a charge of stealing Martin's money. But it does not appear *at what time* the sister of Price told the defendant that her brother Christopher had said he would kill Martin; nor *at what time* her brother sent by her the word to him; nor what evidence the State had adduced against the defendant; nor *at what time* Martin was killed. The only date given in the bill of exceptions, is the date of the conversation between the witness Whitsett and the defendant, which was called out by the defendant himself.

It is a general rule, that a party cannot make evidence for himself, either by his acts or declarations. To this rule there are exceptions. Here, it is said, the declaration is a fact. But, in the language of Chief-Justice Parker, we answer, "the fact is also a declaration." Conceding it to be true, "that, at the time of making the declaration, it probably had no reference to any controversy; yet, if it be admitted that such declarations are good evidence, we shall soon find cases of declarations and assertions of a fact as having happened, with a view *to support what may be afterwards done*, when it is too late to have its effect, and when it may become necessary to antedate, if we may use the expression, the fact in controversy."—Carter v. Gregory, 8 Pick. R. 165; State v. Scott, 1 Hawks, 24; Towle v. Stevenson, 1 Johns. Cases, 110; Jones v. Huggins, 1 Dev. 223; Perrie v. Williams, 5 Mart. Rep. N. S. 694; Ligon v. Orleans Nav. Co., 7 *ib.* 682; Watson v. Osborn, 8 Conn. R. 363; Parker v. Goldsmith, 16 Ala. R. 526; Reynolds v. Tompkies, 17 Ala. R. 109;

Martin v. Williams, 18 *ib.* 190; Mahone v. Reeves, 11 *ib.* 345; McLean v. The State, 16 Ala. R. 672.

But, conceding that the sending word by the defendant to Christopher Price, as offered to be proved, was an act, and not a declaration; yet it was an act of the defendant offered *as evidence for himself.* It was an equivocal act. The time when it was done does not appear; and, to make it admissible *for him*, it was essential that it should appear that it occurred within the period covered by the criminating evidence, or that it *tended* in some way to explain some fact or circumstance introduced by the State, or to impair or destroy the force of some evidence for the State; "for, otherwise, the prisoner would be at liberty to take the whole range of his life, in the course of which his character and his designs may have undergone a complete change."—1 Phil. on Ev. (edition of 1849,) 479, 480; Roscoe's Cr. Ev. 89; McLean v. The State, and other cases, *supra;* Oliver v. The State, 17 Ala. R. 582.

The evidence as offered by the defendant, was not admissible under any general rule. If admissible at all, it could only be so upon some exception, or under certain circumstances. It is not shown to be within any exception, and no circumstances appear which would have made it admissible. We can make no intendment in favor of the party excepting; but must make all reasonable intendments in favor of the ruling of the court below. No error is shown in any of its rulings, and we must, therefore, affirm its judgment, and direct its sentence to be carried into execution.

RICHARDSON *vs.* THE STATE.

[SCIRE FACIAS AGAINST BAIL.]

1. *Recognizance not part of record.*—In *scire facias* against bail, for the failure of the principal to appear in accordance with the condition of their bond, the

recognizance is no part of the record, unless made so by plea or bill of exceptions.

2. *Judgment final against bail.*—In such proceeding, it is not necessary that the final judgment should show that the sureties were called and made default.

APPEAL from the Circuit Court of Shelby.

The record does not show the name of the presiding judge.

IN this case, Alonzo Richardson, one of the appellants, was indicted for an assault and battery, and entered into recognizance, with Thomas L. Morrow and Thomas Harrison as his sureties, for his appearance at the next term of the circuit court, and from term to term thereafter until discharged by law, to answer said indictment. Having failed to appear at the March term, 1857, a judgment *nisi* was entered against him and his sureties; and a *scire facias*, issued thereon, was executed on all the parties. On the return of the *scire facias*, Richardson appeared, and showed cause against the confirmation of the forfeiture; but his showing being deemed insufficient, the court rendered final judgment against him and his sureties on the bond. The recognizance, as copied in the transcript, is conditioned in the penal sum of *two* dollars; while in the judgment *nisi*, the *scire facias*, and the judgment final, it is described as being conditioned in the sum of *two hundred* dollars. The appeal is sued out by all the defendants, and all join in the assignment of error.

S. LEIPER, for the appellants.

M. A. BALDWIN, Attorney-General, *contra*.

WALKER, J.—In a proceeding by *scire facias* against bail, for the failure of the accused defendant to appear, the recognizance of bail is not a part of the record, unless it has been so made by plea or bill of exceptions.—Chiles v. Beal, 3 Ala. 26; Robinson v. The State, 5 Ala. 706; Shreve & Knapp v. The State, 11 Ala. 676; Young v. Simral, 3 A. K. Mar. 176. It results, that we cannot look to the recognizance copied into the transcript, for the purpose of seeing that it is in a different sum from that

stated in the *scire facias*, and in the judgments *nisi* and final.

2. It was not necessary that the judgment final should show that the sureties were called and made default, nor is the judgment erroneous on account of its omission to show this.—Hinson v. The State, 4 Ala. 671.

The judgment of the court below is affirmed.

HUEY *vs.* THE STATE.

[INDICTMENT FOR SELLING LIQUOR TO SLAVE.]

1. *Presumptive evidence of offense.*—Under section 3286 of the Code, the fact that a slave is found in the night time, immediately after coming out of a house where merchandise is sold, in possession of spirituous liquor, is made presumptive evidence of guilt against the keeper of the house, when indicted for selling liquor to such slave.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. WILLIAM M. BROOKS.

THE indictment in this case charged, that the defendant "did sell, give, or deliver, to a slave named Joe, the property of Mrs. Kavanaugh, vinous or spirituous liquor, without an order in writing, signed by the overseer or master of such slave, specifying the quantity to be sold, given or delivered." "On the trial," as the bill of exceptions states, "the State introduced a witness, who testified, that during Christmas week, 1856, he saw a slave, Joe by name, the property of Mrs. Kavanaugh, going by night into the defendant's grocery, and into the back room thereof, in the town of Huntsville in said county; that the slave had some article in his hand, which he supposed was a handsaw; that he saw said slave come out of said grocery, and immediately afterwards examined his person, and found a bottle of whiskey in the pocket of his pantaloons. Another witness for the State testified, that he

frequently delivered to the defendant, at his said grocery, during the year 1856, several barrels, marked whiskey, brandy, &c. The State also introduced three witnesses, by whom it attempted to prove, that defendant kept vinous or spirituous liquors for sale in his said grocery; but said witnesses stated, that, though they had been in said grocery, and had there made purchases from the defendant, they saw no liquors there, and nothing but family groceries, consisting of coffee, meal, flour, &c. This was all the evidence; and thereupon the court charged the jury, that if they believed from the evidence that the slave Joe was the property of Mrs. Kavanaugh, and was seen, in December, 1856, going into the defendant's grocery, in this county, and coming out of said grocery, in the night time; and was thereupon examined, and had in his pocket a bottle of whiskey; and that spirituous liquors or merchandise was at that time kept for sale in said grocery,—it was presumptive evidence of the defendant's guilt. The defendant excepted to this charge, and requested the court to instruct the jury, that, to convict the defendant, they must be satisfied he kept spirituous or vinous liquors for sale; and that it was not sufficient for this purpose, that it was proved he kept merchandise, other than spirituous or vinous liquors, for sale. The court refused this charge, and the defendant excepted."

WALKER, CABANISS & BRICKELL, for the appellant.
M. A. BALDWIN, Attorney-General, *contra.*

STONE, J.—Section 3286 of the Code reads as follows: "Upon the trial of indictments under the preceding and section 3283, evidence that the slave was seen, in the night time, or on Sunday, going into a place where spirituous or vinous liquors or merchandise are sold, with an article of traffic, and coming out without the same; or that such slave was seen at such time, or on such day, immediately after coming out of such place, in possession of spirituous or vinous liquor, or merchandise of any kind, is presumptive evidence of the guilt of the defendant."

It is contended for the plaintiff in error, that the circuit

judge, in his charge, misconstrued the section of the Code above copied; that the second clause of the section provides for two distinct classes of offense; and that the presumption of guilt which the law intends to raise, can only exist when the *particular article* found in the slave's possession, "immediately after coming out of such place," is of the class "sold" in that place. There is much plausibility in this argument, and it harmonizes with what we suppose was the policy which dictated the enactment. The language of the statute, however, is plain, and leaves no room for construction.

In Mangham v. Cox, 29 Ala. 81, 88, in speaking of a statute which is highly penal in its provisions, we laid it down as the duty of courts, to give to statutes full operative effect, in "cases clearly within their letter, and which are not proved to be clearly without their spirit."—See, also, Spaight v. The State, 29 Ala. 32.

That the rulings of the primary court are strictly in accordance with the letter of the statute, we think cannot be successfully controverted. In such case, if we were to enter the field of conjecture in search of a supposed *spirit*, other than what the legislature have clearly expressed, we might not only travel out of our legitimate sphere of duty, but do a much greater wrong than that we were seeking to avoid.

If there was in this case any proof, tending to show that the defendant did not sell, or keep for sale, spirituous liquors; then such proof should have been duly weighed by the jury, in determining whether the presumptive evidence of guilt, declared by the statute, was so far impaired, as to leave it insufficient to support a conviction. There is nothing in this record which negatives the idea that defendant had the full benefit of this principle; and in support of the correctness of the ruling of the primary court, it is our duty to presume such was the case.—See State v. Merrick, 1 Appleton, 398; State v. Bennett, 3 Brevard, 514.

It may be a question whether the act, approved February 9th, 1852, (Pamphlet Acts, 82,) bears on the section of the Code we have been considering. That statute

declares, "that the words 'or merchandise,' whenever they occur in the second section of 'an act providing for the more effectual prosecuting of persons trading illegally with slaves,' approved 7th February, 1850, be, and the same are hereby, repealed."

If the statute last copied bears on the Code, it makes a substantial alteration in its phraseology and construction, and would necessarily lead to a reversal of this case. It refers in terms only to the act of 1850. Whether it also repeals the words, "or merchandise," as found in section 3286 of the Code, depends on the construction of other provisions of the Code.

Section 10 declares, that "all acts of a public nature, designed to operate on all the people of the State, not embraced in this Code, are hereby repealed." The plain import of this language is, that if by any provision of the Code a former statutory provision is substantially retained, the effect is that the former statute is not repealed, but merely continued in force.—Frankenheimer v. Slocum, 24 Ala. 373. On the other hand, all former *acts of a public nature*, which were not retained in the Code, were by it repealed. If, then, section 3286 is substantially identical with the second section of the act of 1850, the Code did not repeal it.

On the hypothesis that section 3286 of the Code and section 2 of the act of 1850 are in substance the same, and, as a result from this, that the second section of the act of 1850 is not repealed by the Code, it would become material to inquire whether section 11 of the Code bears on this question. That section declares, that "any public or general laws, passed at the session of the general assembly convened on the second Monday of November, 1851," (the session during which the act of February 9th, 1852, was passed,) "supersede any provision of this Code with which they conflict." If, then, section 3286 is but a continuation—a re-print—of section 2 of the act of 1850, the act of 1852 repeals the words "or merchandise" in that section of the Code, as well as in the act of 1850.

We think, however, that the act of 1850 was repealed by the tenth section of the Code. Not to mention any

other discrepancies, the act of 1850, (§ 2,) in defining the *place* in which the alleged illegal trading takes place, describes it as "a place where spirituous liquors or merchandise are *usually* sold;" while the Code omits the word "*usually*." To say of a place that spirituous liquors or merchandise are sold there, is not equivalent to saying they are *usually* sold in that place. To justify the presumption under the Code, the proof is sufficient, if, *at the very time* of the ingress or egress, spirituous liquors or merchandise are sold in that place, although there may be no selling either before or after that time. Under the act of 1850, a habit or custom of traffic in the articles designated must have been proved.—Moore v. The State, 16 Ala. 411.

The judgment of the circuit court is affirmed.

BROWN *vs.* THE STATE.

[INDICTMENT FOR RETAILING.]

1. *Selling liquor drunk on or about premises.*—Although, in a majority of cases, it may be a question of fact for the jury, whether the place at which the liquor is drunk is "about the premises" of the seller; yet, where it is shown that the liquor was drunk in the public road, in front of the seller's store, in full view thereof, and within the distance of ten, fifteen, or twenty steps, the court may instruct the jury that it was drunk "about the premises." (WALKER, J., *dissenting.*)

From the Circuit Court of Perry.

Tried before the Hon. C. W. RAPIER.

THE indictment in this case was in the general form prescribed by section 1059 of the Code. The bill of exceptions is as follows:

"On the trial of this case, to make out the offense charged in the indictment, the State introduced the following testimony: That the defendant kept a store in said

county, near to the public road leading from Greensboro' to Centreville. Some time in the month of February, or March, preceding the finding of the indictment, the defendant, with three or four other persons, was sitting in the passage or porch in front of his store, facing the public road, when a white man, a stranger, passing the road, stopped his wagon, and, approaching the store with a bottle in his hand, asked for whiskey. Thereupon the defendant, looking at his bottle, (which would hold a good deal more than a pint, but not a quart,) replied, that he could not sell him less than a quart. The stranger then said, that he would take a quart; and the defendant sold him a quart, and measured it to him in a quart measure. The stranger filled his bottle out of the measure; and, walking out of the store, stopped, after getting out of the porch, as if going to drink. The defendant told him, that he could not drink there. The stranger then went on to the ditch dividing the defendant's premises from the public road, and, stopping, asked the defendant if he was far enough; but the defendant told him, no—he could not drink there. The stranger then went on to his wagon, in the middle of the public road, rather behind his wagon, and asked the defendant if he was far enough now; and the defendant replied, that he (defendant) had no control over the public road, and he could do as he pleased. The stranger then drank out of the bottle, and also a negro he had with him; and then, returning to the store for the balance of his quart, he put it in his bottle, and went on his way. The place where the liquor was drunk was in a public road, or highway, from ten to twenty steps, according to one of the witnesses, and according to another from fifteen to twenty steps, from the defendant's store. The witnesses for the State testified, that said selling and drinking occurred in said county, within twelve months before the finding of the indictment; also, that the defendant was habitually, and by reputation, strict and rigid in the prohibition of drinking liquor on or about his premises,—forbidding its being done, and not suffering drunken men about him.

"The above being, in substance, all the evidence that

was introduced on the trial, the court charged the jury, among other things, that if the public road passed immediately by the defendant's premises, where his store was situated; and the liquor was sold by him, and was drunk, not upon his premises, but upon the road, within ten or twenty steps from his store, and within view and speaking distance of it,—then it was drunk about his premises, and he would be a retailer within the meaning of the law.

"The defendant excepted to this charge, and requested the court to give the following charges:

"1. That, the place where the liquor was drunk being a public road, and the property of the public, and not on the premises of the defendant, he had no right to prohibit the liquor being drunk there, and the jury cannot find him guilty because he did not prohibit it.

"2. If the jury believe that the drinking took place in the public road, and that the defendant expressly prohibited the drinking on his premises, they must find him not guilty.

"3. If the jury conclude from the evidence that the defendant, at the time he sold the liquor, did not know where it would be drunk, and did not afterwards wink at or encourage the drinking of it in the public road where it was drunk, but simply refrained from attempting to prohibit its being drunk there, where he had no right or power to prohibit it,—they must find the defendant not guilty.

"The court refused each one of these charges, and to each refusal the defendant objected."

I. W. Garrott, and R. J. Reid, for the prisoner.

M. A. Baldwin, Attorney-General, *contra*.

STONE, J.—Under our statute law, as it existed before the Code went into operation, "merchants and shop-keepers" were permitted to "retail liquors by the quart" without license, * * so that the same" was "not drunk, with their consent and privity, in their stores, or on the premises where they resided, or had their stores."—Clay's Digest, 555, § 4. The Code (§ 1058) declares all persons

retailers who sell liquors "in any quantity, if the same is drunk on, or about the premises."

It is scarcely necessary to point out the differences, apparently studied, observable in these two enactments. The first limits the prohibition to drinking *on* the premises of the seller, and with his *consent* and *privity*. The latter enlarges the forbidden grounds very materially—*on* or *about* the premises; and ignores *consent* and *privity*, as an element of the offense. It certainly requires no argument to show, that a place in a public highway, within ten, fifteen or twenty steps of the defendant's store in front, and in full view of it, comes within the purview of the phrase, "*about* his premises."

In announcing, as a matter of law, and on the hypotheticated facts submitted by the circuit court to the jury for ascertainment, that the place where the drinking took place was about the premises of the seller, it is not our intention to assert that this is always a question of law. In a majority of cases, perhaps, it would be a question of fact for the jury. Such was the case of Easterling v. The State, 30 Ala. 46. When, however, as in this case, the testimony is plain and simple, and the place where the drinking is done is obviously *about* the premises of the seller, the credibility of the evidence, and the amount of the fine, are the only questions for the jury.

The construction contended for by plaintiff in error would obliterate all distinction between the old and new statutes. Indeed, he is driven to this, as the only plausible argument he can urge in favor of reversal. The old statute had been construed, (see Downman v. The State, 14 Ala. 243;) and if the legislature intended to retain the law as it previously existed, they certainly would have copied its language, and in this way preserved not only the statute, but also its judicial exposition. See, also, Easterling v. The State, *supra*. They did not pursue this course, but employed language essentially different. Shall we, on the presumed hardship of the case, say they did not mean what they have said? Our duty is to expound, not to enact the law. When the legislature

speak within the pale of the constitution, we have no discretion but to obey.

But is it clear that there is any thing oppressive in the enactment? Licensed liquor-dealers are hedged around by many restraints. They must, before obtaining a license, produce a certificate of good moral character, and must take and subscribe an affidavit, the provisions of which are very comprehensive and salutary. The cost of license to retail is also a material item in the public revenue.—Code, §§ 1056, 1057, 397. Possibly, the legislature intended to increase the revenue from this source, by increasing the perils attending the traffic without license. Possibly, the intention was to withhold from persons who would not purchase the privilege the means of profit in this particular pursuit, which others, more obedient to the laws, obtained only by a compliance with its provisions. Possibly, the legislature supposed that the public good would be promoted by increasing the necessity for a license, and thus bringing a larger number of liquor-sellers under the restraints of the oath required by section 1057 of the Code. Or, possibly, the evils of social drinking *about* the premises of the seller, with the attendant brawls and breaches of the peace, unchecked by the guards which the law places around licensed traffic, entered into the policy which dictated the statute. With their intentions, however, save as we gather them from the language they have employed, we have nothing to do.

The judgment of the circuit court is affirmed.

WALKER, J.—The existing law of this State makes it a misdemeanor to sell liquors in the quantity of a quart without a license, "if the same is drunk on or about the premises."—Code §§ 397, 399, 1059. Upon the facts presented in the charge given, the whiskey sold was not drunk "ON THE PREMISES;" for it has been decided by this court, both before and since the adoption of the Code, that the premises of the seller are the places "over which he has the legal right to exercise authority and control." Easterling v. The State, 30 Ala. 46; Downman v. The State, 14 Ala. 242.

The charge must be wrong, then, unless the facts upon which it authorized the jury to regard the defendant as a retailer, show that the liquor was drunk about the premises of the seller. It is our province to decide whether the charge was right, not whether the defendant was guilty. The only things requisite, under the charge, to make the place about the defendant's premises, are, that it should be upon the road, within ten or twenty steps of the store, and within view and speaking distance of it. Is it a legal presumption, to be asserted by the court, that a place within ten or twenty steps, in the road, and within view and speaking distance, is about the premises? In Easterling v. The State, the drinking was about the same distance from the premises; was in the public street, and must have been within speaking distance. The only point of distinction, between that case and the case made in the charge given by the court in this, is, that there the drinking was out of view, because there was an intervening obstruction; while here the drinking was in view.

If Easterling v. The State, a recent decision, is not overruled by my brethren, their decision, in affirming the correctness of the charge in this case, can be vindicated only upon the ground, that, all other things being the same, the guilt of violating the law in this case consists in the fact that the drinking was in view. In Easterling v. The State, the liquor was carried away in the seller's vessel, and drunk at the distance of fifty feet from the place of sale, in the street; and then the vessel was returned. I can not regard the fact that the drinking was in view, as a material fact, distinguishing the two cases. To one who wished to evade the law, it would be a matter of no difficulty to require the liquor to be carried fifty feet from the door, in such a direction that the drinking could not be seen. I object, therefore, to the decision of my brethren, because it overrules, in my opinion, our recent decision in Easterling v. The State. That decision I think objectionable for indefiniteness; but, as far as it goes, it is, in my opinion, right, and ought not to be overruled. It defines the phrase, *about the premises*, as embracing "places over which the seller has no legal right to exer-

cise authority or control, but which are yet so near to his premises, and so situated in relation thereto, that to permit the liquor sold by him to be drunk at them would produce the very evil in kind, though not in degree, which the prohibition to drinking it on his premises was intended to prevent." By this decision, proximity is not the sole test whether the place is about the premises: it must not only be near, but it must be so situated in relation to the premises that drinking at it would produce the same evil in kind, as would result from drinking on the premises. This is manifestly correct, for it is conceivable that one might drink within forty or fifty feet of the place of sale, in speaking distance and in full view, and yet be in his own chamber. If a place in proximity to the premises is necessarily about the premises, then one who sells a quart of liquor would violate the law, although he should believe, and have every reason to believe, that the liquor sold would be carried away, and should act upon a promise by the purchaser to carry it away, and should follow the purchaser to a place off his premises, but near them, and there make every effort which the law permits to prevent the drinking. One may thus know the law, desire to observe it, believe that he was observing it, and use all the power which the law permits him to use in order to prevent a violation of the law, and yet be guilty. The question of guilt is placed entirely beyond his control. He may become, against his will, and in despite of his utmost efforts and caution, a violator of the law. The power to prevent a violation of the law depends upon the conduct of the purchaser, although it may have been impossible for the seller to foresee or to prevent that conduct. Any man in the State who sells by the quart may be constituted an involuntary violator of the law, by the fact that some purchaser chooses, after he gets into the street or public road, and while he is yet near, to drink of the liquor. I do not think a construction of the law, which leads to such a result, is either reasonable, or consistent with the purpose of the legislature. The effect of such a construction is, that the only mode of avoiding a violation of the law is to abstain from selling without a

license. The legislature manifestly did not intend to abolish the sale of liquors in quantities not less than a quart; and a construction ought not to be placed upon the law, which will accomplish that object by indirection.

For these reasons, I think this court was right, in the case above referred to, in requiring that the place should have a certain relation to the premises, in order to bring it within the term 'about the premises.' When does a place occupy such a relation to the premises, that to permit drinking at it would cause the same evil in kind which is incident to drinking on the premises? In Swan v. The State, 11 Ala. 594, a work-bench, not on the land of the seller, but near his premises, was held to be his premises, because he was using the bench, and the liquor was drunk on the bench from vessels furnished by the seller. That decision tended to meet that class of cases, where the liquor was drunk, off the land of the seller, at some place used as a mere point of convenience for tippling with liquor supplied from the establishment of the seller; but that decision was overruled in Downman v. The State, 14 Ala. 242. In the latter case, *the premises*, the term used in the old law, was held to include only places over which the seller had a legal right to exercise authority and control. Thus an extensive class of cases, where the same evils existed as result from drinking on the premises, was left under our law unprovided for. To meet those cases was the object of adopting in the Code a law variant from, and more comprehensive than, the rule of decision laid down in Downman v. The State, or even in Swan v. The State. If liquor is drunk at a place used as a mere point of convenience for drinking from the seller's premises; or if it is understood by the seller that it is bought simply to be taken to some neighboring place to be drunk, because it is a convenient point for drinking in reference to the place of supply, the same evils would result, as are caused by drinking on the premises. Tippling in crowds, congregated drinking, and the temptation to excess by the facility of obtaining fresh supplies, and all the other evils of drinking on the premises, would exist. This is the class of cases which was contemplated by this court,

in Easterling v. The State, as breaches of the law prohibitory of the sale of liquor when it is drunk about the premises.

If the defendant in this case knew, or had reason to believe, that the liquor which he sold would be carried by the purchaser to some place hard by, as a convenient point at which to drink a part of the liquor, and then to return for the remnant, the place would certainly be placed in such a relation to the premises, that to permit drinking at it would produce the same evils attendant upon drinking on the premises. For, if the seller could vend to one man, having the purpose to drink in the road, within ten or twenty steps, and return for more, he could, under the same circumstances, sell to any number. The result would be, that all the evils of drinking on the premises would be produced. But it ought not to be in the power of the purchaser, without the knowledge of the seller, and in the absence of any circumstances sufficient to induce the inquiry or suspicion of a vigilant and cautious man, to place any spot off his premises in such a relation to them as to constitute him a violator of the law; for then the law would become a mere snare to entrap men into the commission of misdemeanors. In my opinion, the insertion of the words "about the premises" was designed to meet the deficiency in the old law, made apparent by the decision of Downman v. The State; and to meet the large class of cases where the same object is accomplished as if drinking were had upon the premises, although it is done off the premises; and in which the law was evaded. This view of the law meets the evil to be remedied; is suggested by the previous decisions; allows a reasonable motive to the legislature, and avoids the imputation of the wrong of allowing an act, and yet hedging it around so that the most careful and law-abiding citizen can not do the act without subjecting himself to an indictment, as the result of another's conduct, which he could neither foresee nor prevent.

It may be that the defendant might properly be found guilty upon the facts of the case; but, in my judgment, the court was not authorized to assert, as a proposition of

law, that the defendant was, upon the facts mentioned in the charge, guilty.

HARRIS *vs.* THE STATE.

[INDICTMENT FOR GAMING.]

1. *Sufficiency of indictment.*—An indictment for gaming, which charges the defendant, in several counts, with playing "at a game with cards, or dice, or at some device or substitute therefor," at each one of the places prohibited by the statute, is a substantial compliance with the provisions of the Code.
2. *Playing at a game with a device or substitute for cards.*—To authorize a conviction under an indictment for gaming, on proof that the defendant played a game of *euchre* with dominoes, it must be referred to the jury to decide, 1st, whether that game, when played with dominoes, is substantially the same as when played with cards; and, 2d, whether dominoes had become, at the time of the defendant's playing, a device or substitute for cards in playing euchre, or were in fact so used in that particular game in which the defendant participated.
3. *Opinion of witness inadmissible.*—A witness for the State cannot be asked, on cross examination, "whether or not dominoes were a device or substitute for cards in the game at which the defendant played."

From the Circuit Court of Perry.

Tried before the Hon. C. W. RAPIER.

THE indictment in this case, to which a demurrer was interposed and overruled, was in these words:

"The grand jury of said county charge, that Robert O. Harris, before the finding of this indictment, played at a game with cards, or dice, or at some device or substitute therefor, at a tavern. And the grand jury of said county charge, that Robert O. Harris, before the finding of this indictment, played at a game with cards, or dice, or at some device or substitute therefor, at an inn," &c.; specifying in separate counts all the places enumerated in the statute.

The evidence adduced on the trial, and the rulings of the court in relation to it, are thus stated in the bill of exceptions:

"A witness for the State testified, that the defendant played a game of dominoes, in a storehouse in said county, within less than twelve months before the finding of the indictment; that said game is played with twenty-eight pieces of bone, numbered from one to six, besides one suit of blanks; that there were seven suits; that the game played by defendant was called euchre, which might be played by from two to five persons; that three others played with the defendant, it being a four-handed game; and that the game is played thus: Turning the numbered sides of said pieces flat on the table, the players then turn over one each; and the one turning the piece with the highest number of spots, wins the trump. The pieces are then shuffled, with the faces turned down; each player draws five pieces, and one of them turns up another piece for a trump. The one so turning up the trump is not the player who won the trump, or whose trump it was, but the player on the right of the one so winning the trump. The player who won the trump has the right to discard one of his pieces, and, in lieu thereof, take the piece turned up as a trump; and if, after so discarding and taking up said trump, his opponent won or took three tricks, his opponent gained two in the game. When four persons played at the game, ten was the number which had to be gained, to win the game. In playing, each player must follow suit, if he can; and if not, he may trump. In playing the game, the phrases, 'trumps,' 'marches,' 'tricks,' 'dealt,' 'shuffled,' and 'euchred,' were used. The spots on the pieces regulated the value of the dominoes, reference being had to what was trumps. At the game of euchre, if any player had no spots on the dominoes corresponding with that led by his opponent, he could trump, and take the trick; so many tricks making a point in the game. To ascertain what was trumps, the rule was this: When a trump was to be made, the end of the domino upon which was the greatest number of spots, was the trump-number; as, for instance, if six-

one were turned up, six would be the trump, and all the dominoes having six on the end would be trumps. As to the dominoes which were not trumps, their value was determined by the number of spots on them; the one having the highest number of spots being most valuable. If, for instance, sixes were trumps, and five-one were led, five-two would have the greatest value, and would take the trick, if only two persons were playing the game. To play the game of euchre, five was the number of dominoes drawn.

"The witness further testified, that the defendant did not know how to play at a game of cards, was a member of a Christian church, and in the best standing as such, and was as good, upright, steady and moral a citizen as lived in the State; that many of the best citizens, and orderly members of churches, in the community where the playing took place, occasionally amused themselves by playing the same game with dominoes; that no liquor was retailed at the storehouse where said playing took place, and none was retailed in the village where it was located; that the owner and proprietor of the store was himself a church-member, and would not allow a card to be thrown in his house, with his consent, under any circumstances. On cross examination, the defendant propounded this question to said witness: 'Whether or not were dominoes a device or substitute for cards in the game at which defendant played, as testified to by him?' The State's counsel objected to this question, on the ground that it called for the opinion or conclusion of the witness. The court sustained the objection, and would not let the question be asked or answered; but stated that the defendant might ask the witness, whether the game at which the defendant played with dominoes, as testified to by him, was or was not a game which is played with cards. The defendant excepted to the ruling of the court in refusing to allow said question.

"Another witness for the State was then introduced, who testified, that he was acquainted with the game of euchre, as played with dominoes, and as played with cards; and that the game was played, with dominoes, as above

stated. Also, that when the player entitled to the trump discarded a piece, and took up the trump, he was said to be euchred, if his opponent made three tricks; and his opponent then made two. If either party made the whole five tricks in playing a hand, he was said to make a march, and counted two. To win the game, five or ten was the number fixed on to be gained; and the player who took three, out of the five tricks, made one in the game. Said witness further testified to the general principles regulating the game of euchre with dominoes, as stated by the first witness, and to the use of the same phrases in the game, whether played with dominoes or with cards. Also, that with cards, their value in the game depended upon the suit turned up by the player. For instance: If clubs were trumps, all the clubs out are trumps; and of the other cards out, the highest of the suit led will take that trick. With cards, the jack, or knave, of the trumps of the suit led, is the right bower; and the knave of the suit of like color is the left bower. The right bower is the highest trump; the left bower the next highest in value; then the ace of the suit of trumps; then the king; then the queen; and so on down. The bowers do not make a point in the game, but are only high trumps: a player may have both bowers, and yet not make a point, and even be euchred. If the knaves are not dealt out to the players, there would be no bowers in playing that hand; and a hand is frequently played in which no bowers are out. In dominoes, the doublets are the highest trumps, as stated by the first witness. For instance: If sixes were trumps, double-six would be the highest trump, and six-five the next highest; but they were never called bowers, but only the highest trumps. A game of euchre could be played with dominoes. The doublet of the number turned up for trumps, and the second highest number, might not be dealt out; and a player might even have the doublet and the next highest trump, and be euchred as in cards, only making two tricks as in cards.

"The solicitor then produced before the court and jury a pack of cards and a set of dominoes, and, with said last

witness, exemplified the game of euchre with cards. The witness testified, and showed, that the game was played, with cards, by first shuffling the cards, and then cutting for the deal, the player cutting the card of highest value being entitled to the deal; that the dealer then shuffled the cards, and dealt around to each player, first two or three cards, and then again two or three, as the case might be, so as to give each player five, and then himself turned up the trump; that each player followed suit, as in dominoes, if he could, and, if he could not, might trump; that a player was said to be euchred in the same manner at the game with cards as with dominoes; that when a player won all the tricks, he was said to win a march, at the game with cards, as well as with dominoes; and that the player who made three tricks at the hand, in either game, was counted one in the game. A game of euchre was then played by the solicitor and said witness, first with cards, and then with dominoes; and the following results were shown: Five cards were dealt out, as above stated, to each player; and one of the players made one point in the game. Five dominoes were then dealt out, and he made one point. The cards were then taken up, and played out, with like result; and then again the dominoes, until the game was finished; the points that made the game and won it having been made with cards and dominoes. Said witness testified, on cross examination, that a deck of cards for playing euchre consisted, if he was not mistaken, of thirty cards, and not twenty-eight; that in playing the game with cards there were a right and a left bower, which were the knaves of the suit of trumps and of the other suit of the same color; that the right bower was the highest card in the game of euchre with cards, and the left bower the next highest; that in point of fact, when the game was played with dominoes, there were no right and left bowers, though he had heard the double-six and six-five pieces called the right and left bower.

"The State having rested on the above evidence, the defendant introduced five witnesses, all experts in the game of euchre, both with cards and with dominoes,

whose testimony was," substantially, that euchre with cards, and euchre with dominoes, were not the same, but different games; that a player, skilled in either game, could not play the other without first learning it; and they specified particularly all the points of difference between the games. "It was admitted, to save time, that forty other witnesses, who were all present in court, and all experts in the game of euchre, both with cards and with dominoes, should be considered as testifying to the same facts. The defendant then introduced two witnesses, one of whom understood the game of euchre with dominoes, but not with cards, and the other of whom understood playing it with cards; who then endeavored to play a game of euchre before the court and jury, one with cards, and the other with dominoes, but testified that it was impossible. Another witness for the defendant, who was an expert at the game of euchre, both with dominoes and with cards, testified, that he was present in court during the playing between the solicitor and witness above described, and observed the game; and that the solicitor *stocked* the cards, and played the game with a deck of cards not used in playing euchre,—not using the face cards at all, and using the cards of ten spots, and down to the deuce. The solicitor then played a game of euchre with said witness, with a proper euchre deck of cards, and with a set of dominoes; and took tricks, and made points, with both; and said witness then stated, that the game could be played through, and the result would be the same as in the first game above referred to.

"The above was the substance of all the evidence; and thereupon the court charged the jury, amongst other things,—

"1. That if the defendant, within twelve months before the finding of the indictment, and in Perry county, played with dominoes, in a store, a game which is played with cards, then he would be guilty of playing at a game of cards with a device or substitute therefor.

"2. That the defendant would be so guilty, although they might believe that he did not know how to play a game with cards.

"3. That if they believed that the game of euchre, as played with dominoes, is a game played with cards; and that the defendant played euchre with dominoes, at a storehouse in said county, within twelve months before the finding of the indictment, then he would be guilty under the statute against gaming, and it would be their duty to so find him.

"4. That if they should find that the games of euchre with cards and euchre with dominoes, though played differently in some respects, are played upon the same principles, and with the same results, and are substantially the same game; and that the defendant played at the game of euchre with dominoes, at a storehouse in said county, within twelve months before the finding of the indictment,—then the defendant would be guilty of a violation of the statute against gaming, and they should so find him.

"The defendant excepted to each of these charges, and asked the court to instruct the jury as follows:

"1. That before they can find the defendant guilty, they must believe that, in the game played by him, he used dominoes as a device or substitute for cards.

"2. That before they can find the defendant guilty, they must believe that, in playing the game with dominoes, he used the dominoes as a device or substitute for cards.

"3. That unless they find from the evidence that the defendant played at a game of cards in point of fact, using the dominoes as a device or substitute for cards, they must find him not guilty.

"4. That if they believe from the evidence that the game played with dominoes was a proper game at dominoes, as well as at cards; and that the defendant played the game with dominoes as and for a game with dominoes; and that he was not playing a game at cards, using the dominoes as a device or substitute for cards,—they must find him not guilty.

"The court refused each one of these charges, and the defendant excepted to the refusal of each."

I. W. GARROTT, for the appellant.

M. A. BALDWIN, Attorney-General, *contra.*

RICE, C. J.—Where the Code prescribes the ingredients of an offense, and lays down a form for indictments for that offense, that form, *mutatis mutandis*, is equivalent to an indictment which alleges the existence of the ingredients of the offense, and of the facts in the doing or not doing whereof the offense consists. It is upon that ground, that the forms of indictment laid down in the Code may be sustained. For, when they are thus treated, they do not relieve the State from any proof which would be required of it under an unexceptionable common-law indictment, nor fail to give the defendant notice of the matters against which he is to defend himself. It is certainly proper to consider and treat him as possessed of a knowledge of *the legal effect* of the indictment. Under the influence of these views, we hold, that the indictment in this case, which is substantially, if not literally, in the form prescribed in the Code for indictments under section 3243, is a good and sufficient indictment for the offenses denounced and defined by that section. True, the words used in the indictment and form are not indentical in sound with those employed in that section; but their *legal effect* must be deemed and taken as the same. And under the indictment, the State is not entitled to a conviction, without proof of the elements of the offense declared and prescribed by the aforesaid section.—See Code, § 3244; Cochran v. The State, at the last term, 30 Ala. 542.

2. One of the offenses punishable under said section 3243, is playing at a game with a device or substitute for cards, at a storehouse. That is the offense of which, it seems, the defendant was convicted in this case; and therefore, we shall inquire whether the defendant appears to have been tried and convicted according to law of that offense. In trying him, it was the duty of the court to refer to the jury the following questions of fact: 1st. Did the defendant, within a year before the finding of the indictment, in the county in which it was found, play at a game of "euchre" with dominoes? 2d. Was "euchre"

a game which could be played with cards? 3d. Was the game of "euchre" with cards, and the game of "euchre" with dominoes, though played differently in some respects, substantially the same game; that is, played upon similar principles, and with similar results? 4th. Had dominoes *either* become a device or substitute for cards in playing the game of "euchre," at the time defendant played at the game for which he is indicted, or were they in fact used in that single game, though never before, as a device or substitute for cards. It was the duty of the court, on referring these four questions of fact to the jury, to direct them that if, without any reasonable doubt, they should decide all these questions in the affirmative, then they ought to find the defendant guilty; otherwise, they ought to find him not guilty. It will be noticed, that the foregoing question numbered 4, is put or stated alternatively; and to prevent any misapprehension, it is proper to say, that if the jury decide either branch of said alternative question in the affirmative, that meets the requirements of the law, so far as the said question is concerned.

We deem it unnecessary to go into any particular examination of any of the charges given or refused; because it is manifest that the four questions above stated by us were not referred to the jury by the court below; and because what we decide in this opinion will probably be sufficient to guide the action of the court below on another trial.

3. We are satisfied there was no error in sustaining the objection to the question put by the defendant to the witness. The effect of allowing the question to be put to and answered by him, would be to submit to the decision of the witness a point which the jury alone can try.

For the error in not referring to the jury the four questions of fact herein above stated, the judgment of the court below is reversed, and the cause remanded.

WILSON *vs.* THE STATE.

[INDICTMENT FOR GAMING.]

1. *Objections to petit jurors.*—In the organization of the jury for the trial of a person charged with a misdemeanor, the State having objected to three of the jurors on the regular panel, "the court, before permitting their places to be filled, required the defendant to make his objections to the remaining nine"; and the defendant having objected to three of them, "the court directed the sheriff to summon six jurors of the other regular panel, to supply the places of the six thus objected to, and required the State and the defendant to select out of the six jurors so summoned." *Held*, that the action of the court was not erroneous.
2. *Broker's office public house, and, prima facie, entirety.*—A broker's office is a public house, within the prohibition of the statute against gaming; and where such office consists of two rooms, front and back, connected by a door, and the front room is used for the transaction of the broker's business, and contains all his books, papers and money, the back room is equally within the statutory prohibition, although used and occupied as a sleeping room by a member of his family, who paid no rent.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. WILLIAM M. BROOKS.

THE bill of exceptions in this case is as follows:

"In the organization of the jury in this case, preliminary to the trial, the State objected to three of the jurors who were on the regular panel No. 1; and the court, before it would permit their places to be filled, required the defendant to make his objections to the remaining nine jurors; the defendant objecting to this action of the court, and excepting to the overruling of his objection. The defendant having then objected to three of said jury, the court directed the sheriff to summon six jurors from the regular panel No. 2, to supply the places of the six thus objected to, and required the State and the defendant to select out of the six jurors so summoned from the regular panel No. 2; to which ruling of the court, in limiting the summons as aforesaid, the prisoner objected, and excepted to the overruling of his objection.

"After the case had gone to the jury, the following

evidence was introduced: It was proved, that the defendant, within twelve months before the finding of the indictment, had played at cards, at night, in the back room of Neal & Fariss' office, in the town of Huntsville in said county; that said office was rented by Neal & Fariss, and had two rooms; that the front room opened on the street, and had a door and one window, (the window having a wooden shutter, not latticed,) and was used and occupied by them as a broker's office, where they dealt in money, and bought bills of exchange; that they kept their money, books, and every thing else connected with their business, in said front room, and there transacted all their business; that they never transacted any business after night, but always in the day time; that their office was never open at night, and no lights were ever put in said front room after night, and no one ever called at their office after night to transact any business with them; that the front door of said front room was always closed at nightfall, and so was said front window, and the shutter to the window was always fastened at night; that the front door of said front room was at the right corner of the room; that there was a door between the two rooms, which was at the left-hand corner of the back room; that a person standing in said front door, with the door between the two rooms open, could not see into said back room; that said back room was occupied as a sleeping-room by one William Wilson; that all the furniture in said room, except the chairs, consisting of a bed, wardrobe and wash-stand, belonged to the said Wilson; that said Wilson, when at home, always slept there, and no one else used it in his absence; that said room had one window and a back-door, both opening on a brick wall in the rear, which was eight feet from said room, eight feet high, and run the whole length thereof; that said window had a wooden shutter, not latticed, which was always closed; that the back-door was generally closed, and, when open, no one could see into the room on account of said wall; and that the playing, for which this defendant is indicted, occurred at night in this room.

"It was proved, also, that there was never any card-

playing in said back room, except at night, and never any in said front room; that the front door and window were always closed when there was any card-playing in said back room; that there was never any card-playing in said back room when there were any lights in the front room, or when any business was being transacted in said front room; that the door between the two rooms was generally closed at night, and, when closed, no one in the front room could see into the back room; that there was no transom light over said door; that Neal & Fariss and said Wilson had each a key to said front room; that there was but one key to the middle door, which remained in the lock, and was always on the inside of the back room; that the usual way of getting to the back room was through the front room; that cards were frequently played in said back room at night; that the character of the game was generally controlled by said Wilson, who always directed when the game should break up, as well when Neal & Fariss played there, as when they did not; that cards were sometimes, but not often, played in said room at night, when Wilson was not there; that persons generally had no right to go there, to play cards; that the playing there was confined to the particular friends of said Wilson and Neal & Fariss, from eight to ten in number; that if any one else had gone there, it would have been considered a breach of propriety; that the partners of the firm of Neal & Fariss were both married men, and slept at their respective houses; that said Wilson was the brother-in-law of Fariss, and took his meals at his house; that Neal & Fariss charged him no rent for said back room, but got him to sleep there at night, because they had large sums of money in the front room, and as a protection thereto; that the door between the two rooms was generally open by day, and Neal & Fariss were frequently in there during the day; that they kept their drinking water in said room, and had the right of ingress and egress at any time during the day; that when the front door and window were closed, no one could see into either of said rooms, nor could any one see into the back room when the middle door was closed, nor could any one

from the street or front door see into the back room when the front and middle doors were open, nor could any one from the rear see into the back room when the rear window and door were closed, or even when the rear door was open, because of said wall.

"This was all the evidence in the cause; and thereupon, at the request of the solicitor, the court charged the jury, that if they believed the evidence, the place where the card-playing occurred was a public house, and they must find the defendant guilty; to which charge the defendant excepted."

WALKER, CABANISS & BRICKELL, for the appellant.

M. A. BALDWIN, Attorney-General, *contra.*

RICE, C. J.—The manner of organizing a jury, for the trial of a person charged with a *misdemeanor*, is not particularly prescribed by the Code, but is regulated by the general provisions contained in the following sections thereof:

"§ 3474. To dispose of the petit jurors for the transaction of business, the clerk must, on the day on which they are summoned to attend, prepare by lot a list of their names; the first twelve must be sworn, and called the first jury; the next twelve must then be sworn, and called the second jury; and if there are any more petit jurors in attendance, they may be placed on a third jury, or put on either of the other juries, as occasion may require; and the jurors *may be transferred from one jury to another*, as the convenience of the court or the dispatch of business requires."

"§ 3475. When, *by reason of challenges, or any other cause*, it is necessary, the court may cause petit jurors to be summoned from the by-standers, or the county at large, either to supply the deficiency on juries, or to form one or more entire juries, as the occasion requires."

These provisions distinctly recognize the right of challenge, as secured and regulated by other sections of the Code. But they clearly authorize the circuit court, in the case of a misdemeanor, as well as in every other case

to which they are applicable, to put upon the State and the defendant *at once*, for acceptance or challenge, twelve of the regular petit jurors, or *a smaller number*, and to *transfer* regular petit jurors from one jury to another. In such a case as this, a discretion as to these matters is conferred upon the circuit court; the exercise of which will not furnish cause of reversal, unless the right of challenge, or some other right of the defendant, appears thereby to have been denied or impaired.—Haight v. Holley, 3 Wend. R. 258. It does not appear in this case, that any right of the defendant was denied or impaired by the action of the court below in relation to the organization of the jury to try him.

2. Upon the evidence, and the former decisions of this court, it is clear that the front room of "Neal & Fariss' office," is a public house within the meaning of section 3243 of the Code. It is equally clear that the back room of the office partakes of the character of the front room, unless the occupation of the back room by William Wilson prevents that result. If the said Wilson had *rented and occupied* it for his sleeping apartment, it may be conceded, that it could not have been regarded as a public house within the meaning of said section 3243.—Dale v. The State, 27 Ala. R. 31. But he had not rented it. He held it, not for himself, but for Neal & Fariss; not as their tenant, but rather as their servant, and as part of the family of Fariss, who was his brother-in-law. He could not have maintained trespass against them, or either of them, for entering that room. They could have turned him out of it when they would. They could have declared on his occupation of it, as their own occupation. His occupation of it was, in law, their own occupation.—Bertie v. Beaumont, 6 East's Rep. 33; The King v. Stock, 2 Taunton's Rep. 340; 2 East's Crown Law, 500–503. Regarding, as we must do, the occupation of the back room of their office as in law their occupation, it was as much a public house, within the meaning of section 3243 of the Code, as the front room, as is fully shown by our previous decisions.—Huffman v. The State, 29 Ala. R. 40; Arnold v. The State, *ib.* 46; Brown v. The State, 27 *ib.*

47; Burnett v. The State, 30 *ib.* 19; Moore v. The State, and Cochran v. The State, at the last term.

There is no error; and the judgment of the court below is affirmed.

BRAMLETT *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Sufficiency of transcript on change of venue.*—If the defendant, after going to trial without objecting to the sufficiency of the certified transcript on which he is to be tried, afterwards moves in arrest of judgment, because the transcript does not show the organization of the grand jury, by which the indictment was found; and the court suspends action on the motion, until an amended transcript has been obtained, supplying the deficiency of the first, and then overrules the motion,—there is no error in this of which the prisoner can take advantage. (WALKER and STONE, JJ., holding, that the court had power thus to supply the defects of the transcript; and RICE, C. J., holding, that the defect was waived by the prisoner.)
2. *Constitutionality of section* 3615 *of the Code.*—Section 3615 of the Code, requiring the accused, after change of venue, to be tried on a certified copy of the indictment, is not violative of any constitutional provision.
3. *Sufficiency of verdict.*—A verdict in these words, "We, the jury, find the defendant guilty of murder in the first degree, *and assess capital punishment*," having been altered, at the suggestion of the court, so that the last clause read, "*and that he must suffer death*,"—held good and sufficient in either form.

From the Circuit Court of Benton, (now Calhoun.)
Tried before the Hon. WILLIAM M. BROOKS.

The prisoner, Larkin Bramlett, was indicted at the fall term, 1853, of the circuit court of Cherokee, for the murder of Benjamin F. O'Bannon; was arraigned at the same term, and pleaded not guilty. After several continuances, the cause was removed, on the application of the prisoner, to the circuit court of Benton, now Calhoun county, where a trial was had at the November term, 1857, which resulted in his conviction.

The verdict of the jury, as appears from the bill of exceptions, was in these words: "We, the jury, find the

defendant guilty of murder in the first degree, as charged in the bill of indictment, and *assess capital punishment.*" When this verdict was returned, "the court asked the jury, if they intended by their verdict that the prisoner should suffer death; and suggested that, if such was their verdict, they had better change it, so as to insert the word *death*, instead of *capital punishment.* Thereupon all the jury orally responded, that they had found by their verdict that the prisoner should suffer death; and forthwith struck out the words *capital punishment*, inserted the word *death* in the place thereof, and returned said verdict, so altered, into court. Said verdict was thereupon received by the court, and ordered to be entered of record, [in these words:] 'We, the jury, find the defendant guilty of murder in the first degree, and *that he must suffer death.*' The prisoner objected to this; but the court overruled the objection, and the prisoner excepted."

The certified transcript, sent by the circuit clerk of Cherokee, to the court in which the trial was had, purported to contain "a full, true and complete transcript of all the orders and entries, as stated of record," in the cause, "together with a true copy of the original bill of indictment"; but did not show the organization of the grand jury by which the indictment was found. The record does not show that the prisoner raised any objection, during the progress of the trial, to the sufficiency of the transcript; but the bill of exceptions states that, after conviction, he moved the court "to set aside the verdict, and arrest the judgment, on the following grounds: 1st, that the circuit court of Benton has no jurisdiction of the case; 2d, that no grand jury was summoned, charged and sworn, before and upon the finding of the indictment; 3d, that it does not appear by the record in said cause that any grand jury was ever summoned, charged or sworn, on or before the finding of the indictment; 4th, that the transcript of the record from the circuit court of Cherokee does not contain any caption of the grand jury who found the bill of indictment; 5th, that said transcript of the record is defective; 6th, that there is no bill of indictment, or properly certified copy of an indictment, in this court;

7th, that there is no legal evidence to this court that there is any bill of indictment against the prisoner; and, 8th, that the judgment is not authorized by law." On the hearing of the motion, the prisoner produced the certified transcript, containing the defect above named, "which was the only transcript in the court; and thereupon the court refused to pass upon said motion, and suspended its judgment, and ordered that the clerk of the circuit court of Cherokee be ordered to send down to this court a full and complete transcript in said cause; to all of which the prisoner objected, and excepted to the overruling of his objection."

On a subsequent day of the term, "and after the sentence of the court had been passed upon the prisoner," the solicitor produced another certified transcript from the records of the circuit court of Cherokee, showing the organization of the grand jury in that court. "The defendant objected to the same, because it was illegal and irrelevant; because it was no part of the records in this cause; because it was not a paper belonging to this court; because it was not properly on file in this court; and because it was not made out, certified, or filed in this court, until after the trial of said cause, and after said cause was ended; and because the same was not properly certified. The court overruled all these objections; the transcript was read, and the defendant excepted. The court then overruled the motion in arrest of judgment, and the defendant excepted."

Alex. White, and M. J. Turnley, for the prisoner:

1. The verdict entered of record, is the verdict of the court, and not of the jury. The verdict of the jury had been brought into court, and read; and it thereby became a part of the proceedings in the case. If it was sufficient, there was no need to change it; if insufficient, there was no power to change it.

2. The motion in arrest of judgment ought to have been sustained. The court in which the trial was had, derived all its authority to proceed in the case from the certified transcript transmitted to it from the court in which the

indictment was found. That transcript was fatally defective, in not showing the organization of the grand jury by which the indictment was found. The court in which the indictment was found, would have no power to try the prisoner, if its records did not show that the grand jury was properly empaneled. The court to which the trial is removed, can only act on the record evidence which the statute requires. If the certified transcript may omit the facts showing the organization of the grand jury, and yet suffice to sustain the jurisdiction of the court; the copy of the indictment, or the order for a change of venue, may also be omitted. Nor can this defect be supplied, as was done in this case, by the production of another certified transcript subsequently made out. The court has no authority to act, unless the evidence of its jurisdiction is before it at the time. To allow the subsequent production of another transcript, purporting to correct the deficiencies of the first, would make its jurisdiction depend upon the accident of its attention being called to its want of jurisdiction. The jurisdiction of a court cannot rest on such an *ex post facto* proceeding.

3. Section 3615 of the Code, authorizing the defendant to be tried "on the certified copy of the indictment," is unconstitutional. The 10th section of the bill of rights secures to him "the right to a copy of the indictment." A copy of the certified copy is not a copy of the original indictment. Matters of form, in criminal cases, are matters of substance.

M. A. BALDWIN, Attorney-General, *contra*.—1. A motion in arrest of judgment, like a demurrer, extends only to defects apparent on the record. If the grand jury was not properly organized, the defect was only available by plea in abatement.—1 Brevard, 169; 2 Stewart, 392, 454; 3 Ala. 378; 5 Ala. 72; 18 Ala. 550; 9 Porter, 370; Code, § 3591.

2. The transcript furnished by the clerk before the trial, is correctly certified.—State v. Brister, 26 Ala. 107; Harrell v. State, 26 Ala. 53; Ward v. The State, 28 Ala. 53.

3. The caption of the certified transcript sufficiently shows that the indictment was found by a grand jury properly organized.—Lapsley v. The State, 7 Porter, 527; Commonwealth v. James, 1 Pick. 375.

4. If the first transcript was insufficient, the defect was supplied by the one subsequently obtained; and it was competent for the court, as well after as before conviction, to obtain an amended transcript, "not for the purpose of curing an original defect, but to make the return of the proceedings of another court conformable to what they really were."—1 Chitty's Criminal Law, 336; 1 Saunders, 249; 3 Modern, 167; 2 McCord, 301; 4 Texas, 125; 1 Brevard, 169; 3 Zabr. 49; 28 Ala. 9; 13 Vermont, 647; 18 Vermont, 70.

STONE, J.—We propose, in this case, to decide no question which is not rendered necessary by the state of the record. The true bill against the defendant for murder was found by a grand jury of the county of Cherokee. At the instance of the defendant, the venue was changed to the circuit court of the county then known as Benton, but now named Calhoun. The defendant was arraigned, and pleaded not guilty, long before the change of venue was applied for and obtained. The trial was had in Benton county, on a certified copy of the indictment; a verdict of guilty rendered, and sentence of death pronounced on the prisoner, which stands suspended to await the action of this court on questions reserved. After the verdict was rendered, and before sentence, the defendant moved in arrest of judgment, on the ground that the transcript from Cherokee did not contain the caption of the grand jury. The court withheld his judgment on said motion, and ordered a perfect transcript to be obtained from the circuit court of Cherokee; which being obtained, and filed, the motion was overruled.

1. It must be conceded, that when the venue, in a criminal case, has been changed, the defendant may raise the question of the sufficiency of the transcript certified from the court in which the indictment was found. If such transcript does not substantially conform to the require-

ments of section 3613 of the Code, the defendant should not be forced to trial; because there will then be wanting in the court trying the prisoner sufficient record evidence of the jurisdiction of the court.—See Ward v. The State, 28 Ala. 53. We do not say, however, that this transcript *creates* the jurisdiction of the court.

It is certainly the policy of our laws, to discourage and dispense with technicalities, as far as may be consistent with a proper regard to life and liberty. That policy, in its application to grand juries, is expressly declared in sections 3470 and 3471 of the Code. True, those sections do not, in terms, bear on the question we are considering; but they, to some extent, indicate a policy to be pursued by us.

In this case, the record, as it now appears in the transcript, shows that the grand jury was properly organized in Cherokee county; that they found and returned into the court the indictment, on a copy of which the defendant in this case was tried; that by a regular order made in the Cherokee circuit court, at the instance of defendant, the venue was changed to Benton, and the defendant there, without objection, went to trial on the copy of the indictment, so certified from Cherokee. He was convicted, and then, for the first time, raised the question of the sufficiency of the transcript. The only defect pointed out was the omission from it of the caption of the grand jury.

The writer of this opinion thinks the following view is a complete answer to this objection, and Judge Walker concurs in this opinion:

The question presented is, had the circuit court of Benton county legal jurisdiction of this case? We maintain that, when the circuit court of Cherokee county, at the instance of the prisoner, made the order for the change of venue, and adjourned the court, without revoking or qualifying that order, all jurisdiction over the prisoner was out of that court, and the same vested *eo instanti* in the circuit court of Benton county. The jurisdiction was not, and could not be, in abeyance. If this be not so, a prisoner who is out on bail, and who obtains a change

of venue, is amenable to no tribunal, but may go whithersoever he will. The certified transcript required by section 3613 of the Code, does not confer or create the jurisdiction. It is simply the *evidence* of a fact which already exists independently of it.

In saying this, we do not wish to be understood as asserting, that the court to which the venue is changed could rightfully try the prisoner in the absence of all evidence of the charge against him. The court in which the indictment was found had no such authority. The indictment is part of the record, and can exist only in writing. We hold, however, that when the transcript, as in this case, contains all those parts of the record on which questions can be raised *"while the trial is in progress"*—the parts which bear on the question of the guilt or innocence of the prisoner, as contradistinguished from the regular organization of the body by which the grand inquest was held—if in such case, the prisoner go to trial without raising the objection, this mere *evidence* of regularity may be supplied at any time before final judgment in the cause, if the same be done before the adjournment of the term at which the conviction is had. The record being *in fieri,* and under the control of the court during the entire term, its completion at any time before the final adjournment relates back, and heals previous informalities.—Franklin v. The State, 28 Ala. 9. See, also, State v. Matthews, 9 Por. 370; State v. Greenwood, 5 *ib.* 474.

Rice, C. J., concurs in the result attained by the majority of the court on this question. The grounds of his opinion are, that by going to trial on the imperfect transcript, without objection, the prisoner waived all right to object in arrest of judgment, on account of the alleged imperfection in the transcript. He thinks, that if, at the time the motion was made in arrest of judgment, there existed, in the imperfection of the transcript then on file, any cause for arresting the judgment, such imperfection could not afterwards be supplied by the production of a more complete record from Cherokee. He cites, in support of his position, Doty v. The State, 6 Blackf. 529; Laforte v. The State, 6 Missouri, 208; Greenwood's case,

5 Por. 474; Matthews' case, 9 Por. 370; Hitt v. Allen, 13 Ill. 592; Gager v. Gordon, 29 Ala. 341; Burnham v. Hatfield, 5 Blackf. 21; Waller v. Logan, 5 B. Monroe, 515; Owens v. Owens, Hardin, 154.

Judge Walker and myself express no opinion on the simple question of waiver; but hold, that if, at the time the motion was made, the imperfection in the transcript was such as to furnish matter for arrest of the judgment, the perfection of the transcript during the term justified the court in overruling the motion.

2. The other objections to this conviction are easily disposed of. Section 3615 of the Code requires a defendant, after change of venue, to be tried on a certified copy of the indictment found against him. This does not in the least impair the right of trial by jury, or trench upon any other principle of the bill of rights.—Ruby v. The State, 7 Missouri, 206.

3. Neither is there any thing in the objection, that the presiding judge directed or permitted a verbal alteration in the verdict of the jury, after it had been read in court. The verdict was good and sufficient, both before and after its alteration. In this case it is not necessary that we should go further.

The judgment of the circuit court is affirmed, and the sentence of the law must be executed.

TAYLOR *vs.* THE STATE, EX REL. HAND.

[QUO WARRANTO TO TRY RIGHT TO OFFICE OF COUNTY TREASURER.]

1. *When statute takes effect.*—A statute takes effect from the day of its approval, unless a different time is expressly prescribed; consequently, statutes of the same session, passed on different days, are not to be regarded as having effect from the same day, because they pertain to the same subject.
2. *Construction of statutes regulating election and appointment of county treasurer of Randolph.*—An appointment by the commissioners' court of Randolph county, after the passage of the act of 15th January, 1852, and before the

passage of the subsequent act of the same session suspending the operation of the former act, (Session Acts 1851–52, p. 477,) could not confer on the person appointed a right to hold the office of county treasurer beyond the then next general election; and the fact that his immediate successor, elected in August, 1854, allowed him to retain the office until the expiration of three years from the time of his appointment, does not confer on the latter the right to extend his term of office an equal length of time into the term of his successor.

3. *Security for costs.*—When an information, in the nature of a *quo warranto*, is filed on the relation of a private person, (Code, § 2655,) the relator must give security for the costs; and if such security is not given before the commencement of the suit, it cannot be afterwards supplied.

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. S. D. HALE.

THIS proceeding was instituted by Brayton J. Hand, as relator, against William W. Taylor, for an alleged usurpation of the office of county treasurer of Randolph. The facts of the case, as presented by the information and answer thereto, were these: On the 2d February, 1852, the office of county treasurer being vacant, one Charles W. Stratham was appointed by the commissioners' court of the county to fill the vacancy, and qualified according to the requisitions of the statute. At the general election on the first Monday in August, 1854, said Taylor was elected to the office, and immediately gave bond, but did not enter on the discharge of his duties until the 2d February, 1855; the duties of the office until that time being discharged by said Stratham under his appointment by the commissioners' court. At the next general election, held on the first Monday in August, 1857, Hand, the relator, was elected to the office, and immediately gave bond, and insisted on his right to enter forthwith upon the discharge of his duties. This claim was resisted by Taylor, on the ground that his own term of office did not expire until the 2d February, 1858. On the question of law presented by these facts, the circuit judge decided in favor of the relator; holding the defendant's answer insufficient. The several statutes whose construction is involved in the question, and which may be found in the Session Acts of 1851–52, on pages 477 and 478, are stated at sufficient length in the opinion of the court.

Before filing an answer to the information, the defendant moved to dismiss the proceeding, because the relator had not given security for costs. The relator then gave bond, with security, for the payment of the costs, which was approved by the court; and the motion to dismiss was then overruled; to which the defendant excepted.

These two rulings of the court are now assigned as error.

J. W. GUINN, and FALKNER & RICHARDS, for appellant.
JNO. T. HEFLIN, *contra.*

WALKER, J.—By the act of 15th January, 1852, the treasurer for Randolph and some other counties is made eligible by the qualified voters, "at the same time, and in like manner, as sheriffs and clerks of said county;" and the commissioners' court is authorized to make appointments for filling vacancies, "until the next succeeding general election."—See Pamphlet Acts of '51–'52, p. 477. By an act adopted twenty-four days afterwards, the statute of 15th January, '52, was suspended as to Randolph county, until the first of February, 1854. During the interval between the adoption and suspension of the act of 15th January, 1852, the commissioners' court of Randolph county elected a county treasurer. The act of 15th January, 1852, was of force at the time of the election.

The rule, which once prevailed in England, that acts of Parliament should be deemed to have been in force from the first day of the session, when not otherwise prescribed, does not obtain here, for reasons which are explained in the case of the Mobile and Ohio Railroad Company v. The State, 29 Ala. 573. It results, that statutes passed at the same session are not to be regarded as having effect from the same day, or as constituting one act, because they pertain to the same subject.

The act of 15th January, 1852, was of force from the date of its approval, and continued in operation, until the suspension act of 9th February, 1852, (twenty-four days afterwards,) was adopted. The appointment of a

treasurer was, then, made by the commissioner's court of Randolph county while the act of 15th January, 1852, was of force. The commissioners' court had no power, at that time, to make an appointment to continue longer than the next general election. On the 18th February, 1854, another act was passed, by which it was prescribed, that the county treasurer of Randolph county should be elected by the people. On the first Monday in August, 1854, an election of treasurer was had; but the treasurer appointed by the commissioners' court continued in office, until the 3d February, 1855, at the expiration of three years from his appointment. Now it is manifest that, after the election on the first Monday in August, 1854, the appointee of the commissioners' court ceased to be the treasurer, *de jure*. It is unnecessary for us to inquire whether his term of service did not expire at an earlier day. Upon the election in August, 1854, the treasurer elect had a right to the incumbency of the office; and that he yielded to the claim of his predecessor, and permitted the latter to discharge the duties of the office until the succeeding February, can give him no right to extend his term of service an equal length of time into the term of his successor. We decide, therefore, that the relator in this case had a right to the office of treasurer, from his qualification, in August, 1857.

Section 2655 of the Code, in reference to the proceeding by *quo warranto*, says: "A judge of the circuit court may direct such action to be brought, whenever he believes these acts can be proved, and it is necessary for the public good; or it may be brought on the information of any person, giving security for the costs, to be approved by the clerk of the court in which such action is brought." Under the authority of this section, we decided, in the State, *ex rel.* Burnett v. The Town Council of Cahaba, 30 Ala. 66, that the omission to give security for the costs was a fatal objection to such a proceeding as this. The statute contemplates that the security should be given before the commencement of the suit. The security is a condition precedent to the right under the statute of instituting the proceeding. The decisions of this court,

before the adoption of the Code, were in reference to an entirely different statute.—Lyon v. Long, 6 Ala. 103; Reese v. Billing, 9 Ala. 263; Whitaker v. Sanford, 13 Ala. 522. Those decisions are not applicable to the question in hand. We think we should virtually abrogate the statute, by holding that the security for costs could be given pending the suit.—Harris v. Alabama and Tennessee Rivers Railroad Co., 25 Ala 232. The court erred, therefore, in overruling the motion to dismiss for want of security for costs; and the judgment of the court below must be reversed, and a judgment must be here rendered, dismissing the proceeding, and awarding against the relator, B. J. Hand, the costs of the court below, and of this court.

OWEN *vs.* THE STATE.

[INDICTMENT FOR CARRYING CONCEALED WEAPONS.]

1. *What constitutes such offense.*—A person who, in the room of another in which there are several persons, bears in his vest pocket a pistol, which is willfully or knowingly covered or kept from sight, is guilty of a violation of the statute (Code, § 3274) against carrying concealed weapons.

From the Circuit Court of Tuskaloosa.

Tried before the Hon. JOHN GILL SHORTER.

THE bill of exceptions in this case is as follows:

"On the trial of this case, the State introduced one Hutchinson as a witness, who testified, that within twelve months before the finding of the indictment, he went into the room of one Charles S. Williams, in said county of Tuskaloosa; that he found in the room Mr. Williams, the defendant, and two or three other young gentlemen; that he remained in the room some twenty minutes, or half an hour; that, while there, he asked the defendant to give him a cap; that the defendant put his hand into his vest

pocket, and took a small pistol out of his pocket, to get a cap; that the pistol was the smallest he had ever seen, and he requested the defendant to let him look at it; that the defendant did so, and, when he and the others had looked at it, it was handed back to the defendant, who again put it into his vest pocket; that he did not see it until the defendant had taken it out of his pocket, and could not see it after he had put it into his pocket as stated; that he did not know whether the pistol was loaded or not; and that, when he went out, he left the defendant in the room.

"This was all the evidence in the cause; and thereupon the defendant asked the court to charge the jury, that unless they believed from the evidence that the defendant had the said pistol when he went into the said room, or took it with him when he left the room, merely having the pistol in his pocket, as stated, was not a carrying of the pistol concealed about his person, within the meaning of the statute. The court refused to give this charge, and the defendant excepted."

E. W. Peck, for the appellant.

M. A. Baldwin, Attorney-General, *contra*.

RICE, C. J.—The defendant was indicted for a violation of section 3274 of the Code, which provides, that "any one who carries concealed about his person a pistol, or any other description of fire-arms, *not being threatened with, or having good reason to apprehend an attack, or traveling, or setting out on a journey*, must, on conviction, be fined not less than fifty, nor more than three hundred dollars."

That section was not designed to destroy the right, guarantied by the constitution to every citizen, "to bear arms in defense of himself and the State"; nor to require them to be so borne, as to render them useless for the purpose of defense. It is a mere regulation of the manner in which certain weapons are to be borne; a regulation, the object of which was to promote personal security, and to advance public morals. To that end, it prohibits the bearing of certain weapons, "in such a manner as is cal-

culated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others."—The State v. Reid, 1 Ala. R. 612.

The word "carries," in the section above cited, was used as the synonym of "bears"; and the word "concealed," as therein used, means, willfully or knowingly covered, or kept from sight. Locomotion is not essential to constitute a carrying within the meaning of that section. A person who, in the room of another in which there are two or three other persons, bears in his vest pocket a pistol, willingly or knowingly covered or kept from sight, without any of the excuses therefor recognized by law, is a violator of the section above cited. The charge asked by the defendant in this case, is in conflict with the law as thus laid down by us. That charge does not simply assert the general proposition, that merely having a pistol in one's pocket in a room, is not a carrying of the pistol concealed about his person, within the meaning of the statute: it goes beyond that, and asserts that, if the defendant did not have the pistol when he went into the room, nor when he went out of it, his "merely having the pistol in his pocket in the room, *as stated*, was not a carrying of the pistol concealed about his person, within the meaning of the statute." The charge as asked was specific, and referred directly to the evidence which showed the manner in which the defendant carried the pistol, and conceded the truth of that evidence. As the truth of the evidence was thus conceded by it, the conclusion it drew from the evidence was a *non sequitur*; for, if the defendant did have the pistol in his pocket, in the room, *as stated by the evidence*, he might be guilty, although he neither had it when he entered the room, nor when he left the room.

Judgment affirmed.

McDANIEL *vs.* THE STATE.

[INDICTMENT AGAINST COUNTY COMMISSIONERS FOR FAILURE TO LEVY TAX.]

1. *Levy of county tax in Cherokee.*—The special act of February 17, 1854, (Session Acts 1853-4, p. 78,) prohibits the commissioners' court of Cherokee county from levying a county tax, for either general or particular purposes, "exceeding fifty per cent. upon the amount of the assessment of State taxes for said county;" consequently, if the highest county tax allowed by this law has been levied, and proves insufficient to pay for the erection of a county jail, after defraying the ordinary expenses of the county, the commissioners are not liable to the penalties prescribed by section 771 of the Code.

APPEAL from the Circuit Court of Cherokee.
Tried before the Hon. WILLIAM M. BROOKS.

THE indictment in this case was found under section 771 of the Code, and charged that the defendants, who composed the court of county commissioners of Cherokee, had failed and neglected to discharge their duties as such commissioners, by not levying a county tax for the erection of a county jail; the old jail being, during their term of office, insecure, insufficient in size, and not properly ventilated. On the trial, as appears from the bill of exceptions, it was admitted, that the county jail was, and had been for more than twelve months during the defendants' term of office as county commissioners, insufficient and insecure for the custody of the prisoners confined therein; that the defendants, as such commissioners, had, from time to time, appropriated moneys out of the general county funds for the repair of the jail, but had not levied a special tax for that purpose, nor for the erection of a new jail; and that their reason for not levying such special tax was, that they had already levied an annual tax, for general purposes, of fifty per cent. on the amount of the State assessment, which was not sufficient to defray the ordinary expenses of the county, and supposed that the special act of 1854, entitled "an act to restrict the county court commissioners of Cherokee county in levying county taxes," (Session

Acts 1853–54, p. 78,) prohibited the levy of any other or greater county tax. On these facts, the court charged the jury, "that if they believed the evidence, they must find the defendants guilty, and assess a fine against each of them of not less than fifty dollars;" to which charge the defendants excepted.

S. K. McSpadden, for the appellants.

M. A. Baldwin, Attorney-General, *contra*.

STONE, J.—All assessments of taxes by the court of county commissioners, under section 704 (subdivision 2) of the Code, are county taxes, whether levied for general or particular purposes. The special tax for the purpose of erecting a courthouse and jail, authorized by section 768 of the Code, is but a special county tax. Each of these species of taxes is embraced under the generic term, county taxes. The act approved February 17th, 1854, (Pamphlet Acts, 78,) provided, "that the county court commissioners of Cherokee county must not levy a county tax for said county exceeding fifty per cent. upon the amount of the assessment of State taxes for said county." The statute employs the generic term *county tax*, and includes taxes both for general and particular purposes. It prohibits the assessment of a greater tax than fifty per cent. on the State tax, for any purpose. As this assessment of fifty per cent. was insufficient to pay for the erection of a county jail, it follows, that the members of the court of county commissioners of Cherokee county are not liable to the penalties prescribed by section 771 of the Code.

Judgment of the circuit court reversed, and cause remanded.

Ex Parte JEMISON.

[APPLICATION FOR MANDAMUS TO COMPEL DISMISSAL OF SUIT BY NON-RESIDENT FOR WANT OF SECURITY FOR COSTS.]

1. *When security for costs is unnecessary.*—In an action brought by several co-plaintiffs, one of whom is a resident of this State, security for costs (Code, § 2396) is not necessary, although all the others are non-residents.

Application for a *mandamus* to the circuit court of Sumter, Hon. Wm. S. Mudd presiding, to compel the dismissal of a suit therein pending, wherein James B. Smith and others are plaintiffs, and William H. Jemison is defendant, on account of the plaintiffs' failure to give security for the costs. The circuit court overruled the motion to dismiss the suit, because it appeared that one of the plaintiffs was a resident citizen of this State at the time the suit was commenced, and so continued up to the time when the motion was heard. The defendant, having excepted to this ruling of the court below, now makes it the ground of an application to this court for a *mandamus*.

Turner Reavis, for the motion.

RICE, C. J.—Where one of several plaintiffs is a resident of this State at the commencement of the action, and at the time a motion is made to dismiss the suit under section 2396 of the Code, for want of security for costs, the motion ought to be overruled. The resident plaintiff is liable to a judgment for costs; and in such case, that section of the Code does not authorize a dismissal of the suit, for the failure to give security for the costs before or at the time the action is commenced.—*Ex parte* Bush, 29 Ala. 50.

The motion is denied, at the costs of the petitioner.

THE STATE *vs.* ELDRED.

[SCIRE FACIAS AGAINST BAIL.]

1. *Sufficiency of bail-bond in description of offense.*—Under the provisions of the Code, (§§ 3668, 3678, 3679,) a demurrer does not lie to a *scire facias* against bail, on account of an incorrect description of the offense in the undertaking of bail, when the undertaking sufficiently identifies the pending indictment.

APPEAL from the Circuit Court of Macon.
Tried before the Hon. ROBERT DOUGHERTY.

IN this case, an indictment having been found at the spring term, 1854, of the circuit court of Macon, against Geo. N. Eldred and J. Robinson, for exhibiting, "at the village of Union Springs in said county, a side show, without first having paid the license as by the statute made and provided;" the defendant Eldred, when arrested, gave bail for his appearance at the next term of said court, to answer said indictment. The undertaking of bail was conditioned for the defendant's appearance at the next term of the court, and from term to term thereafter until discharged by law, "to answer an indictment pending in said court against him for exhibiting a side show at Union Springs in Macon county." The defendant having failed to appear, a judgment *nisi* was entered against him and his sureties, on which a *scire facias* was issued; the *scire facias* and judgment each describing the undertaking of bail as conditioned for Eldred's appearance to answer a pending indictment "for exhibiting a side show at Union Springs, without having first paid license, as required by the statute." The court below sustained a demurrer to the *scire facias*, on the ground that the undertaking of bail did not describe an offense punishable by law.

There is no assignment of errors on the record.

M. A. BALDWIN, Attorney-General, for the State, cited Weaver v. The State, 18 Ala. 293; Williams v. The State, 20 Ala. 63; Code, § 3679.

WATTS, JUDGE & JACKSON, *contra*, cited Howie & Morrison v. The State, 1 Ala. 119; Fair & Simpson v. The State, 6 Ala. 795; Hall v. The State, 15 Ala. 434; Jones v. Powell, 9 Ala. 824; Badger & Clayton v. The State, 5 Ala. 21.

WALKER, J.—The Code contains some new provisions, which are proper to be considered at the outset of this opinion. They are as follows:

"§ 3668. The taking of bail consists in the acceptance, by a competent court, magistrate, or officer, of the undertaking of sufficient bail for the appearance of the defendant, according to the legal effect of his undertaking, or that he will pay to the State a certain specified sum."

"§ 3678. The undertaking of bail binds the parties thereto, jointly and severally, for the appearance of the defendant on the first day of the court, from day to day of such term, and from day to day of each term thereafter, until he is discharged by law; and, if the trial is removed to another county, for the appearance of the defendant from day to day of each term of the court to which it is removed, until discharged by law."

"§ 3679. The essence of all undertakings of bail, whether upon a warrant, writ of arrest, suspension of judgment, writ of error, or in any other case, is the appearance of the defendant at court; and the undertaking is forfeited, by the failure of the defendant to appear, although the offense, judgment, or other matter, is incorrectly described in such undertaking; the particular case or matter to which the undertaking is applicable being made to appear to the court."

The first of these statutes makes the taking of bail consist in the undertaking for the appearance; the second declares, that the undertaking binds the defendant to appear; and the third emphatically pronounces the appearance at court to be "the essence of the undertaking,"

and makes an incorrect description of the offense harmless; "the *particular case* or matter to which the undertaking is applicable, being made to appear to the court." The great and controlling object of these laws was, to make the undertaking of bail a security for the appearance of the accused at court. Their entire stress is laid upon "the appearance." They do not, in terms, exact a specification of the purpose of the appearance. But the forms given in sections 3676 and 3677, which are to be considered in connection with the sections above copied, indicate the intention that there should be some designation of the offense, which the accused should appear to answer. The chief object is the appearance. *The correctness and sufficiency of the description of the offense are treated as matters of slight importance.* Although that description may be incorrect, the undertaking may be forfeited, *if the particular case or matter* to which the undertaking is applicable is made to appear to the court.

Where an indictment is pending, the only purpose to be accomplished, by any mention of the offense in the undertaking of bail, is to connect the recognizance with the case in court. It is not pretended that the undertaking of bail in this case does *not point* to the indictment pending, so as to show the case to which it is applicable. On the contrary, we must regard the description of the indictment as correct; for the case is before us on demurrer, and the statements of the *scire facias* must be taken as true. The requisitions of the statute are certainly filled, when the undertaking of bail itself so designates the pending case as to show the applicability to it.

The fact that the undertaking shows that the indictment is not for an offense punishable by law, is no defense. If it were, the legal sufficiency of an indictment might be tested by a demurrer to the *scire facias;* which this court decided, before the adoption of the Code, could not be done.—State v. Weaver, 18 Ala. 293; Williams v. The State, 20 Ala. 63. No valid undertaking of bail could be taken, when the indictment is bad, if its insufficiency were a ground of demurrer to the *scire facias.* Every undertaking of bail would be worthless, and no offender could

be brought into court, unless the indictment were such that it could stand upon demurrer.

We have placed our decision in this case upon the Code. But we do not wish to be understood as deciding that a different result would have been attained, if we had followed the guidance of the decisions of this court before the adoption of the Code, in the cases of Browder v. The State, 9 Ala. 58; Hall v. The State, *ib.* 827; Hall v. The State, 15 Ala. 431, and Weaver v. The State, 18 Ala. 293. We do not review those decisions, and determine their bearing upon this case, because the Code has made it unnecessary for us to do so.

The judgment of the court below is reversed, and the cause remanded.

CARHART, BROTHERS & CO. *vs.* CLARK'S ADM'R.

[CONTEST AMONG CREDITORS OF INSOLVENT ESTATE.]

1. *Time of verifying claim.*—A claim against an insolvent estate must be filed and verified within nine months after the declaration of insolvency. (WALKER, J., *dissenting.*)
2. *Time of objecting to verification.*—If a claim is not verified within the time required by the statute, an objection to it on that account may be made at any time before or on the settlement.
3. *Commissioner's certificate of verification.*—When a claim is verified before a commissioner of Alabama in another State, the certificate of such commissioner is presumptive evidence that the oath was taken, and that it was taken before a lawful officer.
4. *Proof of filing claim.*—The mere fact that a claim was verified before a commissioner in New York city, five days before the expiration of the time allowed for filing claims, does not authorize the probate court of Sumter county in this State, sitting at Livingston, to reject the claim on the ground that it was not filed in proper time, when the creditor's attorney testifies that, according to his best recollection and belief, the verification was filed in the court before the expiration of the statutory period.

APPEAL from the Probate Court of Sumter.

In the matter of the estate of David W. Clark, deceased, which was declared insolvent on the 2d June, 1856. On the 12th February, 1857, Carhart, Brothers & Co. filed a claim against said estate; which claim was verified by the affidavit of one of the partners of the firm, purporting to have been taken on the 24th February, 1857, in New York city, before Joseph C. Lawrence, as commissioner for the State of Alabama in and for the State of New York; and the certificate of said commissioner, under his hand and seal, was appended to it. No objection to this claim was filed by any one within twelve months after the declaration of insolvency; but after the administrator's accounts had been stated, and the amount in his hands for distribution had been ascertained, an oral objection to its allowance was made, by an attorney who represented the administrator and sundry other creditors, on the ground that the affidavit was not filed within nine months after the declaration of insolvency. The attorney of said Carhart, Brothers & Co. then testified, on oath, "that said claim was duly filed, as marked thereon; that it was withdrawn from the file, for the purpose, as stated at the time, of having affidavit made thereto; and affiant states, as his best recollection and belief, that the same, with the affidavit attached, was returned to the file before the expiration of the nine months." The objection to the claim was then withdrawn, and no other objection to its allowance was interposed, either by the administrator, or by any of the other creditors of the estate. "This being the condition of said claim, and all the testimony for or against the allowance thereof, the court nevertheless rejected said claim, 1st, on the ground that said affidavit was not filed within nine months from the declaration of insolvency; and, 2d, that the name of said Joseph C. Lawrence, before whom said affidavit purported to have been taken, does not appear, as commissioner for the State of New York, on the list of commissioners for the State of Alabama, resident in other States, furnished to said probate court of Sumter by the secretary of state." This ruling of the court, to which an exception was reserved, is the only matter now assigned as error.

A. A. COLEMAN, for the appellants.

TURNER REAVIS, *contra.*

STONE, J.—The act of 1843 was construed, in Hollinger v. Holley, 8 Ala. 454. It was there held, that a claim against an insolvent estate must be filed within six months after the declaration of insolvency; and that a failure to comply with this requirement of the statute could be taken advantage of at any time before, or on the settlement. The clause which required "every such claim to be verified by the affidavit of the claimant," received a different construction. In reference to this verification by the oath of the claimant, the rule declared by that and subsequent decisions of this court was, that a claim which was filed in time should not be rejected for an omission of the affidavit, "where no exception is taken to the claim in the mode pointed out by the act." It was further ruled under that statute, that even after objection on this account, the affidavit might be made at any time before or on the day of settlement.—See Clay's Dig., 194, §§ 10, 11; Bartol v. Calvert, 21 Ala. 42; Gaffney v. Williamson, *ib.* 112; Hogan v. Calvert, *ib.* 194; Brown v. Easly, 10 Ala. 566; Easly v. Shortridge, 10 Ala. 520; Cook v. Davis, 12 Ala. 551; Campbell v. Campbell, 11 Ala. 730; Brazier v. Lile, 13 Ala. 524.

The provisions of the act of 1843 are substantially different from the sections of the Code which bear on this question. While the former is, in its terms, imperative only as to the matter of *filing* the claim within six months, the latter couples the verification with the act of filing, and constitutes both acts *necessary pre-requisites* to the validity of the claim against the insolvent estate. Its language requires that "every person, having any claim against the estate so declared insolvent, must file the same in the office of the judge of probate within nine months after such declaration, or after the same accrues, verified by the oath of the claimant, or some other person who knows the correctness of the claim, and that the same is due; or the same is forever barred."—§ 1847.

We hold, then, that unless the claim, *with its verification*,

is filed within the nine months, the "objection" provided for by section 1854 of the Code is not the only mode of controverting the right to have the claim allowed. As was ruled under the act of 1843, on the matter of filing claims, this objection may be made at any time before, or on the settlement.—Pickle v. Ezzell, 27 Ala. 623.

We differ with the primary court, in the construction of section 1849 of the Code. That section provides, in cases like the present, that "the oath may be made before a notary public, justice of the peace, or any judge of a court of record, or a commissioner of this State." The question arises, in what manner is the court to be informed that the person who certifies the affidavit is in fact the officer he assumes to be? Evidently the legislature did not suppose that our courts should judicially have knowledge of the official character of the certifiers. We could not know who are judges of courts of record, holding commissions under other States. We think that, in all cases, except when the oath is made before a justice of the peace, the Code makes the certificate *prima-facie* evidence of the existence of every requisite to a valid oath; viz., that the oath was taken, and before a lawful officer. We are led to this conclusion by the familiar maxim, *inclusio unius est exclusio alterius*. The section we are considering provides, that when the oath is "made before a justice of the peace, [in another State,] it must be certified that such officer was a justice of the peace, and that his attestation is genuine, by some judge of a court of record, or a commissioner of this State." The same section declares, that when the oath is "made before either of the other officers specified in this section, no other proof of the taking of such oath is necessary, than the certificate of such officer." "A commissioner of this State" is one of the *officers specified* in this section, and we think his certificate makes out a *prima-facie* case of verification under the statute.

We do not hold that the certificate of one styling himself commissioner, notary public, or judge of a court of record, would be conclusive evidence of the fact. The presumption might be overturned by proof.

On the question of fact pronounced upon by the probate

court, the testimony was not very full. The entire proof consists in the record fact, that the affidavit was taken in the city of New York, on the 24th February, 1857; that the nine months expired about five days afterwards; and the evidence of the attorney, that according to his best recollection and belief, the affidavit was filed in the court within the nine months. We know of no rule of law, which would enable the probate court or this court to take judicial knowledge of the distance between the two points, New York city, and Livingston in this State. Nor can we know that the claim could not be carried from one point to the other within the time specified. On the few, simple facts in the record, unaided by others, we think a jury would have found that the affidavit was filed in time; and we think the probate judge should have drawn the same conclusion from the evidence.

The judgment of the probate court is reversed, and the cause remanded.

WALKER, J., dissents on the first point ruled in this case.

WHITE *vs.* RYAN & MARTIN.

[PETITION FOR REHEARING AFTER FINAL JUDGMENT AT LAW.]

1. *Sufficiency of petition.*—A defendant, against whom a final judgment on verdict has been rendered, cannot obtain a rehearing, on the ground of surprise, accident, mistake, or fraud, (Code, § 2408,) when his petition shows that, at the trial term of the cause, after employing an attorney, and filing a plea in bar, he left the court without putting his attorney in possession of the means for trying or continuing the suit; and the fact that he thought it impossible to reach his case, is no excuse for his conduct, when his opinion was formed from the appearance of the docket, and from the opinion of the presiding judge and others expressed in conversation out of court.

APPEAL from the Circuit Court of Marshall.
Tried before the Hon. NAT. COOK.

In this case, a final judgment on verdict having been rendered in favor of Ryan & Martin against Zachariah White, the defendant filed a petition for rehearing, within the period allowed by the statute; the material allegations of the petition being as follows: "Your petitioner was surprised to learn that, at the last term of said circuit court, a judgment was rendered against him, in favor of Ryan & Martin. Your petitioner avers, that he had, as he believed, a good defense to said action, and had employed counsel to defend the same, whom he had advised of his defense, which consisted of a failure of consideration. * * * Your petitioner remained at court, until it was thought impossible to reach the case, with a view to try the cause, if possible, and, if not, to continue it for want of the testimony of Morris D. Vance and Jesse Burgess, by whom he expected to prove the facts above stated relative to the failure of consideration. Said Vance was subpœnaed in said cause, and was in attendance during the early part of the week, and left without your petitioner's consent. Said Burgess was not subpœnaed, because your petitioner did not know, with certainty, what his testimony would be, until it was too late to procure it; the writ not having been served on your petitioner until a short time before the expiration of twenty days before court, when your petitioner was in such a condition that he was unable to make preparations for his defense as fully as he would otherwise have done. Your petitioner believes that, if he had any thought that said cause could have been reached, he could and would have prepared himself for trial, even after the meeting of the court; but his witnesses, who were attending court at his request, left before the trial, under the belief that the case could not be reached; which opinion was formed after conversing with, and partly from the same opinion expressed by, the presiding judge, the solicitor, and others with whom your petitioner conversed, or whose opinion your petitioner heard. Your petitioner, from ill health, could not attend to preparing his case for trial before court, as he would have otherwise done; but, if he had been fully prepared, so utterly impossible did he think it would be

to reach the case, he probably would not have remained at court; his business at home calling him pressingly away, and inducing him, under the circumstances, to leave court before the case was reached." The circuit court sustained a demurrer to the petition, and its ruling is now assigned as error.

B. T. Pope, for the appellant.

Walker, Cabaniss & Brickell, *contra.*

RICE, C. J.—After the adjournment of the term of the circuit court at which it has rendered the final judgment in a cause, the right to apply to it for a re-hearing, or new trial, did not exist before the Code went into effect. By section 2408 of the Code, that right was given, not to defendants generally, but to those only who had been prevented from making their defense by surprise, accident, mistake, or fraud, *without fault on their part.*—Pratt v. Keils, 28 Ala. R. 390.

The statute which gives the right, prescribes four months from the rendition of the judgment as the time, and a petition to a judge of the circuit court as the mode, in which it must be asserted, (Code, §§ 2408–2414;) and of course, the right must be asserted within the time and in the mode thus prescribed.—Samuels v. Ainsworth, 13 Ala. R. 366; Bettis v. Taylor, 8 Porter's Rep. 564.

Although the petition may show that the defendant was prevented from making his defense by surprise, accident, mistake, or fraud; yet, if it shows nothing more, and fails to show that he was so prevented *without fault on his part*, it discloses no right to obtain a rehearing under the Code, or under any other law.

Tested by the rules above laid down, the petition in the present case was radically defective; for, if all the facts stated in it are true, they would not authorize any court, having regard for well-established legal principles and a sound public policy, to say that the defendant was prevented from making his defense in the original cause, *without fault on his part.*—Stinnett v. Br. Bk. at Mobile, 9 Ala. R. 120; Pharr & Beck v. Reynolds, 3 *ib.* 521; Stein

v. Burden, 30 Ala. R.; Paynter v. Evans, 7 B. Monroe, 420; Lawson v. Bettison, 7 Eng. (Arkansas) R. 401; Land v. Elliott, 1 Smedes & Marsh. 608.

If there was no other fault on his part, there was this, that he left the court during the trial term of the original cause, after employing an attorney, and filing a plea in bar, without putting that attorney "in possession of the means for trying or continuing the suit, if the witnesses did not attend."—Pharr & Beck v. Reynolds, *supra.* The excuse alleged for his conduct, that he thought it impossible to reach the case, is wholly inadmissible. See what it would lead to, if every defendant might, by forming such an opinion as to his case, relieve himself from the employment of ordinary or reasonable diligence, and then be allowed to set it up as a title, in whole or in part, to a rehearing. The true position is this: that if a defendant forms such opinion, not from any thing said or done by the plaintiff or the plaintiff's attorney, but from the appearance of the docket, and the opinions of others, including the presiding judge, expressed in conversations out of court, he cannot act upon it, *except at his own peril;* and if he does act upon it, he must take the consequences, one of which is that he shall not be treated as a party *without fault.*—Stein v. Burden, and others cases, *supra;* Yancey v. Downer, 5 Litt. Rep. 8; Bateman v. Willoe, 1 Schoales & Lefroy, 201; Davis v. Presler, 5 Smedes & Marsh. 459; Green v. Robinson, 5 How. (Mississippi) Rep. 80; Faulkner v. Harwood, 6 Randolph's Rep. 125.

The errors assigned as to the rulings of the court on the trial of the original cause, cannot be considered, because the appeal is not taken from the judgment in the original cause; and if it had been, it would have been barred by lapse of time.—Code, § 3040. The appeal is from the judgment sustaining the demurrer to, and dismissing the petition for the rehearing, as to which there is no error.

Judgment affirmed.

DWYER *vs.* KENNEMORE.

[ACTION ON PROMISSORY NOTE UNDER SEAL.]

1. *Who is proper party plaintiff.*—When an action under the Code, (§ 2129,) founded on a "writing obligatory" for the payment of money, is brought in the name of one person, for the use of another, a demurrer lies to the complaint, because it shows on its face that the action ought to have been brought in the name of the beneficial plaintiff.
2. *Amendment of complaint by change of parties.*—In an action on a "writing obligatory," a demurrer having been sustained to the complaint, because it showed on its face that the beneficial plaintiff, for whose use the action was brought, ought to have been the sole nominal plaintiff, the complaint may be amended (Code, § 2403) by striking out the nominal plaintiff.

APPEAL from the Circuit Court of Jackson.
Tried before the Hon. NAT. COOK.

THIS action was brought by William Dwyer, for the use of John G. Kirkpatrick, against Stephen Kennemore, as administrator of William C. Pruitt, deceased; and was founded on said Pruitt's "writing obligatory, for $2,750 30, dated September 4, 1849, and due one day after the date thereof." The court below sustained a demurrer to the complaint, because it showed on its face that Kirkpatrick, for whose use the action was brought, was "the party really interested," and ought therefore to have been the sole and nominal plaintiff. The plaintiff then asked leave to amend his complaint, by striking out the name of Dwyer, so that Kirkpatrick might be the sole party plaintiff of record; but the court refused to allow the amendment, and the plaintiff excepted. These two rulings of the court are now assigned as error.

ROBINSON & JONES, for the appellant.
C. C. CLAY, Jr., *contra.*

WALKER, J.—The fact that this suit is brought for the use of J. G. Kirkpatrick is an acknowledgment that he is the beneficial owner, as has been several times decided by this court.—Johnson v. English, 1 Stewart,

169; Hunt v. Stewart, 7 Ala. 525; Bullock v. Ogburn, 13 Ala. 346. It is, therefore, shown by the complaint in this case, that the suit is not brought in the name of "the party really interested." The cause of action is clearly one required by section 2129 of the Code to be sued upon in the name of "the party really interested." This suit is, therefore, shown by the complaint not to be brought by the proper plaintiff; and therefore, the court below did not err in sustaining the defendant's demurrer.

2. Another question in the case is, whether the court erred in refusing to permit an amendment of the complaint, by striking out, so as to make the person for whose use the suit was brought the nominal and sole plaintiff. Before the adoption of the Code, the beneficial plaintiff, in a suit by the assignor of a note, for the use of one to whom a transfer by delivery had been made, was considered the real plaintiff. This case was unlike Leaird v. Moore, 27 Ala. 326, where it was proposed to strike out the only party plaintiff, bring a new plaintiff forward before unknown to the record, and thus produce an entire change of the party litigating on one side. It is also unlike Stodder v. Grant & Nickles, 28 Ala. 416. In this last case, it was indispensable that he who had the legal title should be the plaintiff; and it was held, that the name of the nominal plaintiff could not be stricken out, so as to make the beneficial plaintiff stand alone, as a party prosecuting his own legal title. The amendment would have struck out one party, and substituted another; and would thus have brought the legal title of a different person into the arena of the litigation. The assertion of the complaint, that the legal title was in the original plaintiff, would have been changed into the assertion, that the legal title was in a different person. A new case, with a new plaintiff, would have been made.

Here the proposition is entirely different. The name of him who had the legal title has been, by mistake, unnecessarily brought into the complaint as a party. There is contemplated no change of the assertion that the legal title was in him. The legal title of no new person is proposed to be brought into the litigation. The

questions to be passed upon, the rules of evidence to govern the trial, and the title and right to be tried, are to remain the same. The complaint itself shows, who is *the real and proper* plaintiff. The name of an unnecessary *nominal* plaintiff is simply to be stricken from the record, leaving the proper plaintiff in the case. The mistake to be corrected is merely to make the beneficial plaintiff the nominal plaintiff, in compliance with the statute which requires one having the equitable title to sue in his own name.

For these reasons we hold, that the amendment proposed in this case should have been allowed under section 2403 of the Code; and that it may be allowed without infringing the doctrine laid down in Leaird v. Moore, or the point actually decided in Stodder v. Grant & Nickles.

While we do not assail the point actually decided in either those cases, we think it proper to remark, that we do not wish to be understood, by anything said in this opinion, as reasserting the principle decided in Stodder v. Grant & Nickles. On the contrary, we think that case is wrong, and ought to be overruled; while Leaird v. Moore is right in principle, and ought to be maintined.

The judgment of the court below is reversed, and the cause remanded.

STONE, J.—There is, as I understand the question, but one theory on which a distinction can be taken between this case and Stodder v. Grant, 28 Ala. 416; namely, that where the amendment of parties implies the assertion that the *legal title* is in a person or persons different from the case made by the original complaint, there the amendment will not be allowed; whereas, if, as in this case, the amendment does not necessarily present a new and different *legal title*, then the amendment will be allowed, unless the case come within the principle asserted in Leaird v. Moore, 27 Ala. 326. This conclusion of mine is, I think, demonstrated by the fact that the amendment proposed in Stodder v. Grant was, in form, precisely the same as that proposed in this case, viz., to strike out the

nominal plaintiff, and leave the suit to progress in the name of the *cestui que use*.

If I am correct in what is stated above, I think any attempt to draw a distinction between the two cases will necessarily lead to one of the following results: 1st, that no amendment of parties can be allowed, if such amendment involve the assertion of a legal title different from that relied on in the original complaint; or, 2d, one rule must be laid down for amendments, when the suit is in the name of one or more persons plaintiff for the use of another, and an entirely different rule where the complaint presents no *cestui que use*. To illustrate: A suit in detinue is brought by A. and B. as plaintiffs, when the title is in fact in A. alone. If the name of B. be struck out, the amended complaint presents a legal title different from the one asserted in the original complaint. If we adopt the first stated of the above results, we will be compelled to refuse the amendment in the case hypotheticated. On the other hand, if we allow the amendment in the case supposed, and adhere to the supposed distinction, we lay down one rule for suits where there is a *cestui que use*, and another where there is none.

I do not think section 2403 of the Code furnishes a foundation for such distinction. I think the intention of that section was, to provide for amendments, even though by the amendment new legal interests were presented or withdrawn, and, in this way, a title *new in respect to the parties to it* should be presented before the court. If we do not give to section 2403 this construction, we limit the right of amendment provided by its second clause to suits on contracts "for the payment of money," as provided by section 2129 of the Code.

I hold, then, that the right to amend in this case, and in the case of Stodder v. Grant, *supra*, rests on precisely the same principle. I think, also, that Stodder v. Grant, and Leaird v. Moore, are distinguishable, and that in overruling the one, we do not necessarily overrule the other. Leaird v. Moore rests alone on the ground that there was but one party plaintiff. Stodder v. Grant had a nominal plantiff, and a *cestui que use*. The statute of 1812 (Clay's

Digest, 313, § 3) recognizes such *cestui que use* as a party; and, in case of the death of the nominal plaintiff, continues the suit in the name of the beneficiary. The Code (§ 2147) contains a similar provision. Giving to Leaird v. Moore its full operation, I think, under the statutes cited above, there was a party plaintiff left on the record, after the nominal plaintiff was stricken out. This principle, I hold, authorized the amendment in Stodder v. Grant, and in this case.

I think, however, that Leaird v. Moore misconstrues the second clause of section 2403 of the Code. That clause reads as follows: "The courts respectively * * * must permit the amendment of the complaint, by striking out or adding new parties plaintiff, or by striking out or adding new parties defendant." The construction heretofore given has been, that there must remain on the record a party plaintiff or defendant; otherwise, there would be nothing to which the new party could be added. This position I think more plausible than solid. I can not understand this language as indicating that the *parties* are the *only* subjects spoken of, or that the *addition* which it authorizes is *of parties to parties*. I hold that, according to the laws of our language, the *new parties* were to be added to the *complaint*, and not to old parties still left on the record.

To show I am correct in my construction of this language, I subjoin two renderings of it: one, on the basis given above; the other, in accordance with Leaird v. Moore and Stodder v. Grant:

1. "The courts respectively must permit the amendment of the complaint by striking out [from it] parties plaintiff or defendant, or by adding [to it] new parties plaintiff or defendant."

2. "The courts respectively must permit the amendment of the complaint, by striking out [from the parties] parties plaintiff or defendant, or by adding [to the parties] new parties plaintiff or defendant."

It being thus shown that the amendment spoken of, is by striking out from the complaint, or adding to the complaint, it follows that the theory on which Leaird v.

Moore rests must fall to the ground. The body of the complaint, although all the plaintiffs may be stricken out, will still remain to be *added* to.

The objection stated in Stodder v. Grant, that if the name of a sole plaintiff were stricken out, the case would be at an end, is, I think, unsound. In case of the death of a sole plaintiff, there is, until the suit is revived, no party in court; and yet, it has never been supposed, in such state of the record, that the case was at an end, if the case was one which under the statute could be revived. While a case is *in fieri*, all these changes or amendments may take place, without producing a perceptible *hiatus*, or disturbing the harmony of the proceedings.

As the question under discussion is one of practice, and can not unsettle titles to property, I am in favor of overruling both Leaird v. Moore, and Stodder v. Grant. In coming to these conclusions, I think I but carry into effect a very salutary legislative provision.

I concur in Judge Walker's conclusions, but not in the distinction which his opinion tends to draw between Stodder v. Grant and this case.

LAY *vs.* CLARK'S ADM'R.

[CONTEST AMONG CREDITORS OF INSOLVENT ESTATE.]

1. *Sufficiency of affidavit verifying claim.*—When a claim against an insolvent estate is verified by the oath of the claimant himself, the affidavit must show that the claim is a just and subsisting demand.

APPEAL from the Probate Court of Sumter.

IN the matter of the estate of David W. Clark, deceased, which was declared insolvent on the 2d June, 1856. On the 28th February, 1857, a claim was filed against said estate by Ward P. Lay, consisting of a schedule, or inventory, of goods, wares and merchandise; accompanied by

the affidavit of said Lay, to the effect, "that the foregoing is a correct inventory of the goods, amounting to $13,379 23, purchased by David W. Clark in his lifetime from the firm of Lay & Clark, and due on the 1st January, 1855;" and the affidavit of one W. W. Runnell, to the effect "that he assisted in taking said inventory, and that the same is correct." No objection to the allowance of this claim was filed within twelve months after the declaration of insolvency; but after the administrator's accounts had been stated, and the amount in his hands for distribution had been ascertained, an oral objection to its allowance was made, by an attorney who represented some of the other creditors, "on the ground that it was not sufficiently verified." Lay then proved to the court that his said claim was just, due, and unpaid; offered to make another affidavit to that effect; and insisted that the objection to its allowance came too late. The court held the first affidavit insufficient, refused to receive the second, because it was not filed within nine months after the declaration of insolvency, and rejected the claim; to which several rulings exceptions were reserved, and which are now assigned as error.

Turner Reavis, for the appellant.

A. A. Coleman, *contra.*

STONE, J.—Section 1847 of the Code provides, that claims filed against insolvent estates must be "verified by the oath of the claimant, or some other person who knows the correctness of the claim, and that the same is due; or the same is forever barred." In Carhart, Brothers & Co. v. Clark's Adm'r, at the present term, we held, that to avoid the bar, both the claim and the verification must be filed within the nine months.—See, also, Pickle v. Ezzell, 27 Ala. 623.

The word "verified," as employed in this section, means proved. The affidavit of Mr. Lay shows a sale of merchandise, the agreed price, and the time when the debt matured. This makes a *prima-facie* case; and, if submitted to a jury, would, in the absence of other proof,

justify a verdict in favor of the plaintiff. Is it sufficient under the section of the Code we are considering?

The statute has not declared, in terms, what shall be a sufficient verification. It furnishes, however, persuasive evidence of what is meant, by prescribing the *extent* of knowledge which the witness shall possess, when the verification is by some person other than the claimant. We can conceive of no good reason for requiring that such witness should *know the correctness of the demand and that the same is due*, unless it be part and parcel of every good verification that it show the claim to be *correct* and *due*. Neither can we find any solid foundation on which to rest a distinction, which would relieve a claimant who verifies his own claim from offering as full proof as is required by a disinterested third person. We think we carry out the intention of the legislature, by holding that the verification, no matter by whom made, shall show that the claim is correct, and that the same is due; in other words, that it is a just and subsisting demand.

In Jordan v. Owen, 27 Ala. 153, we considered the import of the language "correctness of the demand," as employed in section 2313 of the Code. That section is, in its policy, very like the one under discussion. We there said, that when a party "undertakes to prove by his own oath the *correctness* of his demand, he must not only state facts which, if proved by other witnesses, would make out a *prima-facie* case of indebtedness of defendant to him, but he must go further and swear to the fact of nonpayment of the indebtedness."—See, also, Brasher v. Lyle, 13 Ala. 324.

We do not hold that, under section 1847 of the Code, the affidavit shall, in terms, aver that the claim has not been paid. It must, however, appear from the affidavit that the claim is a subsisting demand.

The claim in this case was not sufficiently verified; and the result is, that the judgment of the probate court is affirmed.

CROMMELIN *vs.* THIESS & CO.

[ACTION UNDER CODE FOR USE AND OCCUPATION OF LAND.]

1. *Implied renewal of lease.*—A yearly tenant, holding over after the expiration of his term, is presumed, in the absence of evidence to the contrary, to hold under the terms of the original lease; but this presumption may be rebutted by proof of a new agreement, materially different from the original contract, although such new agreement is void under the statute of frauds because not reduced to writing.
2. *Statute of frauds as to contracts not to be performed within one year.*—A parol agreement for a lease, for the term of one year, to commence at a future day, is void as a contract under the statute of frauds; yet it may be looked to, to explain the subsequent holding of the premises, and to show that it was not upon the terms of a prior valid lease.
3. *Tenancy at will.*—A yearly tenant, holding over after the expiration of his term, under a void parol agreement, is a mere tenant at will, whose tenancy may at any time be determined by quitting the premises, or by a demand of possession on the part of his landlord.
4. *Damages in action for use and occupation.*—In an action for use and occupation, against one who has entered under an agreement for a term, a recovery may be had for the rent of the entire term, although he quitted the premises before the expiration of the term; but a mere tenant at will, who had no term vested in him, is only liable for the value of his actual occupation.
5. *Tenant's right to sub-let.*—In the absence of a stipulation to the contrary, a tenant has the right to sub-let the premises to another, to be used in any manner not inconsistent with the terms of his own lease.
6. *Breach of contract, and waiver.*—Any interference by the landlord with his tenant's right to the enjoyment of the premises, to the full extent secured by the lease, authorizes the tenant to abandon the premises, and exonerates him from the payment of rent; but, if the tenant fail to abandon the premises within a reasonable time, or does any act inconsistent with the right to abandon, he thereby waives that right.

APPEAL from the Circuit Court of Montgomery.
Tried before the Hon. C. W. RAPIER.

THIS action was brought by Charles Crommelin, against B. S. Thiess & Co., to recover $500 for the use and occupation of a storehouse in the city of Montgomery, "from the 1st October, 1854, to the 1st April, 1855"; and was commenced on the 18th April, 1855. In consequence of the rulings of the court on the trial, the plaintiff was compelled to take a nonsuit, which he now moves to set aside;

assigning as error the several rulings of the court, to which he reserved exceptions, and which are thus stated in the bill of exceptions:

"The plaintiff offered evidence tending to show that the defendants, who were druggists in the city of Montgomery, leased his store in said city, from the 1st October, 1853, to the 1st October, 1854, for $1,000, payable quarterly; that, previous to the expiration of said lease, they made a parol contract with him to lease said store for another year, to commence from the 1st October, 1854, for $1,000. The proof did not show that the defendants were restricted to the use of said store as a drug-store, when they leased the same at the times severally above stated. The proof further showed, that during the summer of 1853, and prior to the expiration of the first lease aforesaid, the defendants had agreed to underlease said store to one Joseph, to be used as a grocery-store; the tenancy of said Joseph to commence on the 1st October, 1854, and to continue for one year, that being the term of defendants' second lease from plaintiff. The evidence tended to show, that on the faith of said agreement between defendants and said Joseph, and in consideration thereof, the defendants had agreed to lease another store from said Joseph, to be used and occupied as a drug-store; that after this agreement was made between defendants and said Joseph, and before the 1st October, 1854, when the tenancy of said Joseph was to commence, plaintiff was informed by said Joseph of said agreement, (defendants not being present,) and thereupon objected to the same, and said that his store should not be used as a grocery-store; that subsequently, to-wit, about the last of September, or the first of October, 1854, plaintiff, defendants and said Joseph all being present, defendants told plaintiff that they had sub-let said store to said Joseph, as aforesaid, to be used as a grocery-store; that plaintiff replied, that said store should not be used as a grocery-store, and forbid said Joseph to occupy it as a grocery-store; that defendants then said to plaintiff, 'You may take your store, and rent it yourself'; and that plaintiff replied, 'That is not for us to determine —the law must settle it'. The proof further showed, that

defendants, soon afterwards, commenced removing from plaintiff's store, and, pursuant to said agreement between them and Joseph, removed to said Joseph's store; that they completed the removal of all their medicines, drugs, &c., during the month of October, 1854, and actually occupied plaintiff's said store until their removal as aforesaid, which was about one month after the termination of their first lease; that plaintiff's store, after it was thus vacated, remained vacant and unoccupied, until the 1st October, 1855; that one Nettles applied to defendants, in December, 1854, or January, 1855, to rent said store; that defendants, having the keys of the same, showed the store to said Nettles, offered to rent it to him until the 1st October, 1855, and told him that they had the control of it during that time; that said Nettles did not rent the same; that the keys were retained by defendants, until September, 1855, and were then delivered to a third person, to be given to plaintiff, which was done in October, 1855. There was no proof that plaintiff, before that time, ever demanded said keys, or attempted to obtain the possession of said store; nor was there any proof, except as hereinabove stated, that defendants ever attempted to control said store, from the time when they vacated it as aforesaid, up to the 1st October, 1855.

"Upon this evidence, the court charged the jury,—

"1. That if the proof showed that the second contract between plaintiff and defendants, for the lease of said store, was a parol contract, and was not to be performed within one year from the time of the making thereof, the same was void under the statute of frauds.

"2. That if the defendants leased said store, from the 1st October, 1853, to the 1st October, 1854, for $1,000, payable quarterly; and continued to occupy said store after the 1st October, 1854, the law implied a renting from the 1st October, 1854, to the 1st October, 1855, on the same terms as for the previous year.

"3. That if there was no agreement between the parties that the store should not be used or sub-let for a grocery-store, the defendants had the right to sub-let it to be used for that purpose.

"4. That if the plaintiff, on being notified that defendants had sub-let the store, from the time they moved out, from the 1st October, 1854, to be used as a grocery-store, forbid their sub-letting it for that purpose, and forbid the sub-tenant from using it for that purpose,—this conduct on the part of the plaintiff authorized the defendants to terminate the lease; and an offer on their part to give back the store to the plaintiff would, in law, terminate the lease, although refused by him; and, in that event, plaintiff could only recover the rent for the time that the defendants were actually in possession of said store.

"The plaintiff excepted to the fourth charge, and then requested the following written charges:

"1. That if the jury believe that the defendants rented plaintiff's store, from the 1st October, 1853, to the 1st October, 1854, for $1,000, payable quarterly; and that the defendants held over after the 1st October, 1854, then the law implies a renewal of the lease, from the 1st October, 1854, to the 1st October, 1855, on the same terms as from the 1st October, 1853, to the 1st October, 1854.

"2. That if the jury find the facts as stated in the first charge requested; and, further, that defendants agreed to sub-let the store to Joseph, as a grocery-store, from the 1st October, 1854, until the 1st October, 1855; and that plaintiff forbid defendants from doing so, and forbid said Joseph from taking the store as such sub-lessee; and that defendants thereupon offered said plaintiff back his store, and he refused to take it,—that this would not, in law, be a surrender of the lease.

"3. That if the jury find the facts as stated in the first instructions asked; and, further, that defendant agreed to sub-let the store, from the 1st October, 1854, to the 1st October, 1855, to be used as a grocery-store; and that plaintiff, on such agreement being communicated to him, forbid the same, and forbid Joseph from taking the store as such sub-lessee; and that defendants thereupon replied, that he might take his store, and rent it for himself; and that plaintiff replied, that it was not for them to determine that, and that the law would determine it,—that the offer to surrender by the defendants, under such circum

stances, would not exonerate them from the payment of the rent from the time of such offer.

"4. That upon the same state of facts stated in the third charge requested, the interference on the part of plaintiff would not be such as to deprive him of the right to recover rent from the time of such interference.

"5. That if the jury find the facts as stated in the fourth charge requested; and, further, that after plaintiff's interference as therein stated, and after defendants' reply, that he might take his store, &c., defendants afterwards retained the possession of said store, until the latter part of October, 1854; and, in December or January of the same year, offered to rent it, and retained the keys until September, 1855,—then they would not be entitled to set up plaintiff's interference against the payment of rent.

"The court gave the first instructions requested, and refused the others; and to their refusal the plaintiff excepted."

Goldthwaite & Semple, for the appellant.—1. The court erred in the fourth charge given, and in the refusal of the second, third, and fourth charges asked. Crommelin's interference, in the manner stated, would not have amounted to an eviction, even if Thiess & Co. had vacated the premises within a reasonable time thereafter. If the defendants had the right to sub-let, that right could not be in any wise affected by the plaintiff's forbidding its exercise. It might as well be said, that the landlord's forbidding the tenant to make a fire, or keep a light after a certain hour in the night, would amount to an eviction, if the tenant vacated the premises. The rent could only be extinguished, or suspended, by the agreement of the parties, by surrender, or by eviction; and to constitute an eviction, some actual disturbance of the possession must be shown.—Hunt v. Cope, Cowper, 242; 1 Saund. 204; Fisher v. Milliken, 8 Barr, 111; 2 Saund. Pl. & Ev. 287; Esp. Ev. 239; 5 Johns. 120; 15 Johns. 483; 5 Hill, 52; 4 Rawle, 339. But, conceding that the plaintiff's interference as stated would have justified the defendants in quitting the premises, the charge of the court is still erro-

neous; for it asserts, that such wrongful interference on the part of the plaintiff, coupled with the defendants' offer to give up the store, terminated the lease; thus leaving out of view another material fact, viz., that the defendants must have abandoned the premises in consequence of the plaintiff's interference.

2. The facts stated in the last charge requested, relative to the defendants' retention of the premises after the plaintiff's interference, and their offer to rent the store to Nettles, amount to a waiver of the plaintiff's interference. 4 McLean, 530; 6 Johns. Ch. 469; Addison on Con. 657; Martin v. Everett, 11 Ala. 375.

WATTS, JUDGE & JACKSON, *contra.*—1. The parol agreement to rent the premises was clearly void under the statute of frauds.—Chitty on Contracts, 67, 68, 319–20. The contract being void, the subsequent conversation between the parties, ending in the offer of defendants to give up the store, was a surrender of any right which they had under the parol agreement, even if it were not sufficient to constitute a surrender of a valid written lease. Crommelin's interference was illegal, and authorized the defendants to abandon the contract.—Davis v. Wade, 4 Ala. 208; Magee v. Billingslea, 3 Ala. 680; Pharr & Beck v. Bachelor, 3 Ala. 245; Martin v. Chapman, 6 Por. 344; Perry v. Hewlett, 5 Porter, 325; Cohen v. Dupont, 1 Sandf. S. C. 260; 4 Leigh, 484.

2. The fifth charge asked by the plaintiff was properly refused, 1st, because it excluded some of the facts from the consideration of the jury; 2d, because it would have authorized the jury to give the plaintiff rent for the whole year, when he only claimed to the 1st April; and, 3d, because the facts stated did not authorize the legal inference sought to be drawn.

3. The complaint is for actual use and occupation. There is no count upon any lease, nor for the breach of any lease. The charges asked, being all predicated on the idea that the suit was on a lease, ought to have been refused, even if otherwise unobjectionable.

RICE, C. J.—The most important question for consideration is, on what terms shall the defendants be considered as holding after the expiration of the first lease.

If there was no evidence explanatory of the holding over after the expiration of that lease, the case would be a plain one for the plaintiff. For it is a settled rule, that where a party, having held under a lease for a year, at a certain rent, continues to occupy after the expiration of his term, it is presumed, *if there be no evidence to the contrary*, that he holds for the time, and on the terms of the original lease. But here we have evidence to the contrary; and in a case like the present, "the terms on which he continues to occupy are matter of evidence, rather than of law."—Mayor of Thetford v. Tyler, 8 Ad. & Ellis, (N. S.) 95; Chitty on Contracts, (edition of 1851,) 287, and authorities cited in note (*m*;) Diller v. Roberts, 13 Serg. & Rawle, 60.

Here it appears that, not long before the expiration of the original lease, the parties made a new contract for a second year, to commence from the 1st day of October, 1854. The new contract was materially different from the original lease, in this, that the new contract does not, like the original lease, provide for *quarterly* payments. The law is, that rent from a yearly tenant is payable *yearly*, unless otherwise agreed.—Chitty on Contracts, 284, note (*t.*) The new contract, thus made, and thus differing from the original lease, destroys the implication of the renewal of the original lease, from an unexplained holding over. That new contract is void as a lease by the statute of frauds, because it was verbal, and was not to be performed within a year from the making thereof, (Code, § 1551; Chitty on Con. 67;) yet it was good evidence to explain the holding over, and to show that it was not upon the terms of the original lease.—Chitty on Con. 283, note (*q.*) It shows *that*, but is not operative to create any title of tenancy. The other circumstances set forth in the bill of exceptions, which occurred between the making of the new contract and the day in October on which the defendants completed the removal of their drugs, &c., from the store, very plainly show, that the holding over

was really not upon the terms of the original lease. In fact, it is clear from all the evidence, (if it is believed,) that after the expiration of the original lease, the defendants did not hold under any *valid* express agreement, nor upon the terms of the original lease; that they were in by no title of tenancy whatever, but held at the will of the plaintiff, in the strictest sense of the word; and that he, on any day after the termination of the original lease, whilst they continued in possession, might, by a demand of possession, have determined the will, and thereupon have instituted against them what the Code calls "a real action," in which he could have recovered, not only the store itself, but damages "for the possession, or use and occupation," "to the time of the verdict."—Code, § 2207; Doe, *ex dem.* Hollingsworth v. Stennett, 2 Esp. 717; Goodtitle v. Herbert, 4 Term R. 680; Doe, *ex dem.* Bastow v. Cox, 11 Ad. & Ellis, N. S. 122.

It may be true, that if at any time after the holding over commenced, and before it terminated, the plaintiff had received from the defendants rent, as rent, for any portion of that time, or had done any other act, which, in law, would have amounted on his part to such a recognition of the defendants as his tenants, as to have precluded him from recovering against them in such a "real action" as we have above mentioned, then he might, in such an action as the present, treat them as tenants from year to year. But nothing of that kind appears to have been done; and we need not therefore now decide what its effect would have been, if it had been done.—See Chitty on Con. 287, and other authorities cited, *supra*. *In the absence of any thing of that kind*, the defendants could not, by *their mere act*, (such as retaining the keys, and offering to rent the store to Nettles,) *vest in themselves a term as yearly tenants*, nor incur the liabilities of such tenants for rent.

Upon the evidence, (if it be true,) the defendants held, after the expiration of the original lease, as tenants at will, and had the right to determine their holding by quitting the premises.—Addison on Contracts, (edition of 1857,) 342, 343.

If it were conceded that the defendants, after the expiration of the original lease, held as yearly tenants, the concession would be fatal to the present action; because, upon that concession, the suit was commenced, and the complaint filed, *before the expiration of the year*, and *before any rent* could have been considered as due for that year.

As the case for the plaintiff is now presented by the evidence, it rests only upon "a principle resulting from the nature of an action for use and occupation, (and sanctioned by section 2206 of the Code,) namely, that he who holds my premises, without an express bargain, agrees to pay what a jury may find the occupation to be worth." Mayor of Thetford v. Tyler, *supra;* Addison on Con. 371; Abeel v. Radcliff, 15 Johns. R. 507. "An actual personal occupation is not necessary to sustain the action, when the lessee (that is, a tenant for a term under an agreement) has entered and taken possession, and *the term has become vested in him*, as he 'holds' within the words of the statute, (Code, § 2206,) although he does not occupy." For, as against *such a tenant*, who has once entered, and become vested with the term, a recovery of the rent for the entire term may be had, without any other proof of use and occupation than such entry by him, although it may appear that he afterwards quitted the premises long before his term expired.—Addison on Con. 371, and note (*i*,) referring to Baker v. Holtpzaffel, 4 Taunton, 45, and other cases. But, as against a mere tenant at will, who has no term vested in him, who has made no express agreement, who had the right to determine his holding by quitting the premises, and who has exercised that right, the owner of the premises can not recover more than the actual occupation was worth, in an action for use and occupation; although, if he had elected, during the occupation, to have brought a "real action," he might, in it, have recovered damages for the use and occupation to the time of the verdict.

But, if it were conceded that the holding over of the defendants was as tenants from year to year, and that the yearly term had become vested in them; still it is clear that the said term could lawfully be created, and was

created, without writing. It might, therefore, be terminated without writing.—Addison on Con. 386. There was no stipulation, or agreement, that the store should not be used as a grocery-store, nor that it should not be sub-let. The tenants had, therefore, the right to sub-let it as a grocery-store, and to the quiet enjoyment of the store, either by personal occupation, or by the exercise of that right; and any interference by the landlord, which deprived them of the right of enjoyment of the store to the full extent secured to them under the lease, would authorize the tenants to abandon the premises, and thereby exonerate themselves from the liability to pay rent imposed upon them by the contract. But, if they failed to abandon within a reasonable time, or did any act inconsistent with the right to abandon, they would thereby waive that right.—Dyett v. Pendleton, 8 Cowen, 727; Lawrence v. French, 25 Wend. 443; Jackson v. Eddy, 12 Missouri Rep. 209; Burn v. Phelps, 1 Starkie's R. 94; 6 T. R. 458; Edwards v. Etherington, Ryan & Moody, 268.

Under the views above presented, it is certain that the 4th charge of the court could not have injured the plaintiff *in this action*. Construing that charge in connection with the evidence, we understand "the lease" which it mentions, to be the verbal lease which we have above declared void. As that lease was void by the statute of frauds, and the defendants had the right to treat it as a void lease, the plaintiff could not have been injured, but might have been benefited, by the instruction which made the right of the defendants to terminate it dependent on the interference of the plaintiff, and their offer to give back the store. That lease did not *vest any term in the defendants*. And as we understand that charge to relate only to it, we cannot say that there was any error in that part of it, which limited the recovery of "the rent" to "the time that defendants were actually in possession of said store." If retaining the keys, and offering to rent to Nettles, amount to a continuation of the holding of the store by the defendants, (as to which we do not decide,) they amount to a continu-

ation of the *actual* possession of the store, and would, therefore, have been embraced in the charge as given.

The 1st charge asked was given. The 2d was abstract; and, therefore, there was no error in refusing it, even if otherwise unobjectionable. The 3d, 4th and 5th *assume* that the plaintiff had made out at least a *prima-facie* case, and must recover unless defeated by the matters stated in them respectively. That *assumption* alone authorized their refusal, even if in all other respects they were faultless. There never is error in refusing a charge, which is not, in every particular, authorized by the law and justified by the evidence in the particular case.—Carmichael v. Brooks, 9 Porter, 330.

We find no reversible error in this case, and must affirm the judgment.

YONGE *vs.* MOBILE AND OHIO RAILROAD CO.

[ASSUMPSIT UNDER CODE ON COMMON COUNTS.]

1. *Establishing correctness of demand by plaintiff's own oath.*—The statute (Code, §§ 2313–14) authorizing the plaintiff to establish the correctness of his demand by his own oath, where the amount in controversy does not exceed $300, does not apply to actions against corporations aggregate.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by George C. Yonge, against the Mobile and Ohio Railroad Company, to recover $300, due by open account, for provisions furnished, and work and labor done for said company. On the trial, the plaintiff offered to establish the correctness of his demand by his own oath; having given the notice prescribed by the statute. The defendant objected to this, and the court sustained the objection; to which the plaintiff excepted, and which he now assigns as error.

WILLIAM BOYLES, for the appellant.
GEO. N. STEWART, *contra.*

WALKER, J.—The question in this case is, whether the plaintiff, in an action against a corporation aggregate, upon a contract, where the amount in controversy does not exceed three hundred dollars, is competent to establish the correctness of the demand by his own oath. Sections 2313 and 2314 of the Code, upon the construction of which the question depends, are as follows: "In all suits upon contracts, *where the defendant has been personally served with process*, where the matter in controversy does not exceed three hundred dollars, the plaintiff is competent to establish the correctness of the demand by his own oath, if the defendant is a *resident* of the county; unless *he*, in open court, *denies upon oath* the truth of the facts proposed to be sworn to by the plaintiff." "The plaintiff must give the defendant, or *his* attorney, five days notice of his intention to establish the demand by his own oath; unless the defendant *resides* out of the county, and has no attorney of record within the county; in which case, a notice, filed in the clerk's office five days, has the same effect."

It is clear from the language of the above copied sections of the Code, that they are designed to operate in those cases, where the defendant may have a personal residence, and may be *personally* served with the initiatory process of the suit, and may make a personal appearance in court, and *personally* take an *oath*, and upon such oath contradict the assertion of the adverse party. A corporation aggregate cannot be said to have a residence in the sense in which the word is used; it has no body, and cannot make a corporal appearance in open court, and there take upon itself an oath, and upon that oath deny the truth of what is alleged by the plaintiff. Besides, it is not personally served, but is served under our statute through a designated representative; which last view is conclusive.—Code, §§ 2169–2170. The corporation could not, through one of its officers, appear, and take the oath negativing that to which the plaintiff proposed to swear.

The statute would not allow that. It requires that the defendant should, in open court, make the oath. If an agent or officer of the corporation could appear and take the oath for it, it would follow that the agent of any partnership or natural person might do the same thing. Thus, by departing from the statute, so as to substitute for the corporation defendant its agent or officer, we should make a precedent which might lead to the practical abrogation in part of the statute.

The judgment of the court below must be affirmed.

TROWBRIDGE, DWIGHT & CO. *vs.* PINCKARD'S ADMINISTRATOR.

[CONTEST AMONG CREDITORS OF INSOLVENT ESTATE.]

1. *Sufficiency of affidavit verifying claim.*—The affidavit of the claimants' book-keeper, to the effect that he had entered on the books a bill of goods purchased by the decedent in his lifetime, and that the decedent's note for the amount of the bill is justly due and owing, and that no part thereof has been paid, is a sufficient verification of a claim against an insolvent estate.

APPEAL from the Probate Court of Sumter.

IN the matter of the estate of John M. Pinckard, deceased, which was declared insolvent by said probate court, (but at what time the record does not show,) and against which a claim was filed by the appellants, within the time allowed by the statute. This claim consisted of a promissory note for $848 52, dated New York, March 13, 1854, payable twelve months after date, and signed by said Pinckard; together with a certificate of protest for nonpayment, and the affidavit of one F. P. Wichman, in these words: "I, F. P. Wichman, of the city of New York, hereby certify, that I am, and was on the 13th March, 1854, in the employ of Trowbridge, Dwight & Co., of New York, in the capacity of book-keeper; that on

that day I entered to John M. Pinckard a bill of goods purchased by him from said firm; and that the note for $848 52, dated 13th March, 1854, at twelve months thereafter, is justly due and owing to said firm; and that no part thereof has been paid, either by said J. M. Pinckard, now deceased, or by any other person for his account." The probate court rejected this claim, on account (*inter alia*) of the insufficiency of the affidavit by which it was verified; and this ruling, to which an exception was reserved, is now assigned as error.

TURNER REAVIS, for the appellants.

A. A. COLEMAN, *contra*.

STONE, J.—The language of the witness by whom the claim was verified, is positive. His affidavit cannot be true, unless he "knows the correctness of the claim, and that the same is due." We think it complies with the statute.—Code, § 1847.

The decree of the probate court is reversed, and the cause remanded.

EX PARTE BOAZ.

[APPLICATION FOR MANDAMUS TO PROBATE COURT, IN MATTER OF HABEAS CORPUS FOR CUSTODY OF INFANT.]

1. *Father's right to custody of infant child.*—On *habeas corpus* sued out by the mother, the probate court cannot take an infant child from the custody of its father, and give it to the mother, when no improper restraint of the infant is established.

APPLICATION by Mrs. Jane H. Boaz, suing by her next friend, for a writ of *mandamus*, or other remedial process, to be directed to the probate court of Dallas, for the purpose of compelling that court to take jurisdiction of her petition for the writ of *habeas corpus* against her husband,

to obtain from him the custody of her infant child. The petition for the writ of *habeas corpus*, the defendant's answer thereto, the evidence adduced on the hearing, and the decision of the probate judge, declining to act for want of jurisdiction, are made part of the application to this court. The petition alleged, that Mrs. Boaz had been married to her said husband about four years, and had in the meantime given birth to a female child, who was about two years old when the petition was filed; that her husband, a short time before the filing of the petition, had abandoned her, on account of the institution by her of a chancery suit against him respecting certain property which she claimed as her separate estate, and had removed to another plantation owned by him, carrying with him, against the petitioner's remonstrances, their said infant child; and that, in consideration of the infant's sex and tender years, the petitioner is its lawful custodian. In his answer to the writ of *habeas corpus*, the defendant admitted, that he had voluntarily abandoned his wife, (but for reasons which he deemed sufficient to justify him in so doing,) and had taken his child with him; asserted his lawful right to its custody, and denied that he exercised towards it any unlawful or improper restraint; and denied that the probate judge had any jurisdiction to deprive him of its custody on the application of the petitioner.

Alex. White, Samuel R. Blake, Jno. A. Lodor, and Geo. W. Gayle, for the petitioner.—The general doctrine of the common law, that the father is entitled to the guardianship and custody of his child, is admitted; and it is further admitted that, in case of the voluntary separation of the husband and wife, the custody of the children is a question which the statute gives to the decision of the chancellor. The application here is rested on a distinct ground: the mother's right to the custody of her infant child for nurture; in which case, the court acts solely for the good of the infant, irrespective of other considerations.—3 Burr. 1436; 1 Stra. 444; 2 Stra. 982; 3 Con. Eng. Ch. R. 120, note *b;* 8 Paige, 56; 25 Wendell,

95; 4 Johns. Ch. 83; 13 Johns. 418; 3 Mason, 485; 5 Binney, 520; 18 Wendell, 637; 6 Rich. (Law) R. 344; 8 Johns. 328; 4 Humph. 535; Forsyth on Infants, 10, 65; Bishop on Marriage and Divorce, § 633. The common-law doctrine, as to the father's right to the custody of his child, is based upon his obligation to support it, and his right to its services; he being the only member of the family who could hold property. The principle ought not to obtain here, at least to the same extent; for our laws give the wife a separate estate, and make it liable for the support of her family.

BYRD & MORGAN, *contra*, cited 16 Pick. 203; 8 Paige, 68; 2 Story's Equity, § 1341; 4 Johns. Ch. 80; 13 Johns. 419; 5 East, 221; 25 Wendell, 64, 104; 18 Wendell, 638; 19 Wendell, 16; 16 Eng. Law and Eq. R. 221; 12 *ib.* 463; 14 Geo. 657; 6 Rich. Eq. 249; Bright on Husband and Wife, 318, note *d;* Bishop on Marriage and Divorce, 633–41; 19 Ala. 604; 17 Ala. 14; 3 Ala. 760; 2 Ala. 531.

RICE, C. J.—The law regards the father as the head of the family, obliges him to provide for its wants, and commits the children to his charge, in preference to the claims of the mother or any other person. His right to their custody may be forfeited by misconduct, or lost by misfortune. When *he* asserts it by *habeas corpus*, the court exercises a discretion, for "the benefit and welfare of the infants," and may leave them in the custody of the mother or some other person, in preference to the claims of the father. But when, as in the case at bar, the father has the custody of his infant child, and no improper restraint of the infant is established; and the mother asserts a right to its custody, by *habeas corpus* issued by and returned to a judge of probate, the authorities settle it beyond dispute, that such a judge cannot, in such a case, take the infant from the custody of its father, and give it to the mother. If any improper restraint of the infant itself had been established, the judge of probate would have been bound to have set the infant free from such restraint. But nothing of that kind is established; and the action

of the judge of probate was in accordance with law. Rex v. Delaval, 3 Burr. R. 1434; De Manneville v. De Manneville, 10 Vesey, 52; In the Matter of Deming, 10 Johns. 232, 483; Meveein v. The People, 25 Wendell, 64; Matter of McDowles, 8 Johns. 328; Matter of Waldron, 13 *ib.* 418; Matter of Wollstonecraft, 4 Johns. Ch. Rep. 80; and the numerous authorities cited on the briefs of counsel in the present case.

As the judge of probate had no authority to change the custody of the child from its father to its mother, and as his decision is justified by law, this court cannot grant any relief on the application now made; for, in acting upon the application, our authority is merely revisory, or superintending, and cannot be exercised to disturb what has properly been done by the tribunal whose action we are here called on to revise or control.

The prayer of the petitioner is denied, at the costs of her next friend.

TOWNSEND & MILLIKEN *vs.* COWLES.

[ASSUMPSIT ON GUARANTY OF PROMISSORY NOTE.]

1. *Construction of guaranty.*—A guaranty, endorsed on a promissory note before maturity, in these words, "I guaranty the payment of the within," imports an absolute engagement to pay the debt at maturity, in default of payment by the makers.
2. *Admissibility of parol evidence to affect writing.*—The legal effect of a written contract cannot be varied by proof of antecedent parol stipulations, or representations made through the medium of a letter; but such evidence is admissible to show fraud in the procurement of the written contract.
3. *When misrepresentations constitute fraud.*—A misrepresentation as to the legal effect of a writing, in a matter of mere judgment equally open to the inquiries of both parties, does not constitute a fraud; yet, if any peculiar fiduciary relation exists between the parties, of which one knowingly avails himself to mislead the other by a misrepresentation of the legal effect of the contract, or knowingly takes advantage of the other's actual ignorance of the law,—this would amount to a fraud.

4. *Fraud vitiates contract.*—A contract, procured by fraud, is void, even where the fraud consists of a misrepresentation as to the legal effect of the contract in a material particular.

APPEAL from the Circuit Court of Montgomery.
Tried before the Hon. E. W. PETTUS.

THIS action was brought by the appellants, and was founded on the defendant's guaranty of a promissory note for $581 50, made by Rudler & Rockwell, dated September 28, 1849, and payable eight months after date, to the plaintiffs' order. The guaranty was endorsed on the note before its maturity, and was in these words: "I guaranty payment of the within," (signed) "George Cowles."

On the trial, after the plaintiffs had read in evidence the note and endorsement, the defendant offered to read a letter written to him by plaintiffs before the guaranty was given, dated New York, November 15, 1849, in these words: "We have your esteemed favor of the 6th instant, with enclosures as stated. You will find enclosed, returned herein, the note for $581 50, which we must ask you, in accordance with our agreement, to guaranty, either specially on the back by endorsation, or by attaching a written guaranty. If on the back of the note, please endorse, 'I guaranty payment of the within;' if on paper attached, 'I guaranty to Townsend & Milliken payment of the note in their favor, made by Rudler & Rockwell, dated 28th September, 1849, at 8 months, payable at office of J. S. Winter & Co., Montgomery, Alabama.' *This is the proper form of guaranty, and does not give recourse against you by the holders of the paper, until they have gone to the end of the law against the payers.* We are very much pleased with Mr. Rudler, and feel quite satisfied he will do all he can faithfully to administer the property. At the same time, your own business intelligence will suggest to you the propriety of requiring a compliance with the terms, as agreed on, of our credit to him." The plaintiffs objected to the admission of this letter as evidence, "on the ground that it tended to vary or contradict the written contract between the parties, and also because it was a misrepre-

sentation as to a matter of law merely;" and particularly to the sentence which is italicized. The court overruled all the objections, and admitted the whole letter; and the plaintiffs excepted.

The defendant then introduced the deposition of Michael Rudler, one of the partners in the firm of Rudler & Rockwell, who testified, among other things, that the note was not presented to them at maturity for payment; that they were then perfectly solvent, and, if the note had not been paid, it might have been collected, or at least secured. His answer to the 6th interrogatory was in these words: "The agreement and understanding, under and by virtue of which George Cowles guarantied the payment of said note, was this: That the said Townsend & Milliken should not call upon him, until they had prosecuted Rudler & Rockwell to judgment or insolvency. The understanding was, that in the event of R. & R. not paying the note at maturity, Townsend & Milliken were to use all proper and lawful means to collect the same, before they had any right to call on said Cowles. This was the agreement, as I understood it at the time, and ever since." The plaintiffs objected to this answer, "on the ground that it tended to vary or contradict the written agreement between the parties, as evidenced by the guaranty endorsed on the note;" but their objection was overruled, and they excepted.

The defendant also introduced the deposition of one George W. Read, who testified to the solvency of Rudler & Rockwell at the time of the maturity of said note, and to the fact that, in the fall of the year 1850, a debt for $251 was collected from them, without compromise or deduction. The plaintiffs then introduced the deposition of one J. B. Cronin, who testified, that, in November, 1851, he went out to the Indian territory, west of Arkansas, where said Rudler & Rockwell resided, for the purpose of collecting certain debts due from them to plaintiffs and others; that said Rudler & Rockwell were then wholly insolvent; and that of the claims in his hands due to plaintiffs, amounting to over $2300, and including the

note guarantied by the defendant, he only succeeded in collecting about $300.

"This was all the evidence; and the plaintiffs thereupon requested the following written charges:

"1. That if the jury believed that the defendant made the guaranty, as endorsed on the note, on a consideration, and was induced to do it by the statements contained in the letter of the plaintiffs which had been read in evidence, the statements thus made could not vary the legal effect of such guaranty.

"2. That if the jury believed that the defendant made the guaranty, as endorsed on the note, on a consideration, and was induced to do it by the statements contained in plaintiffs' said letter, to the effect that such guaranty did not give recourse against him by the holders of the paper, until they had gone to the end of the law against the makers, that such misrepresentation, being as to the legal effect of the guaranty, was immaterial, and could not change the legal effect of the guaranty, as written upon the note."

The refusal of these charges, to which the plaintiffs excepted, and the rulings of the court on the evidence, are now assigned as error.

GOLDTHWAITE & SEMPLE, for appellants.—1. The guaranty sued on was absolute and unconditional; no suit against the makers of the note, or notice to the guarantor, was necessary to charge the latter.—Donley v. Camp, 22 Ala. 659. The letter read in evidence, against the appellants' objection, must have been intended to contradict the written contract, or to avoid its effect on the ground of fraud; and it was not admissible for either purpose. A written agreement cannot be varied or controlled by any prior or contemporaneous parol agreement; and the reason is, that all such stipulations are considered merged in the writing, which is presumed to express the final intention of the parties, and to be the best evidence of that intention.—Litchfield v. Falconer, 2 Ala. 280; Tankersley v. Graham, 8 Ala. 247; Adams v. Garrett, 12 Ala. 229; Cole v. Spann, 13 Ala. 537; Carleton v.

Fellows, 13 Ala. 437; Thompson v. Ketchum, 8 John. 189; Carter v. Hamilton, 11 Barb. 147; Logan v. Bond, 13 Geo. 192. It is not insisted that contemporaneous writings may not be regarded as part of the contract, for the letter here did not appear to have been written at the same time with the guaranty.

2. The record does not show that the letter was offered for the purpose of showing fraud; nor was there any issue raising that question. But, if it had been offered for that purpose, it would not have been admissible. Evidence of an agreement, differing from the written contract, does not tend to prove that the letter was obtained by fraud; if so, any prior or contemporaneous agreement, variant from the written contract, but on the same subject, would be admissible, and ought to have been received in all the cases above cited. The expression, sometimes to be found in the text-books, that the rule as to varying or contradicting written contracts does not hold in cases of fraud, is not accurate, and is not sustained by the cases cited to the point. When we speak of a deed being void at law for fraud, we mean simply a fraud which goes to its execution.—Holley v. Younge, 27 Ala. 204; Franchot v. Leach, 5 Cowen, 506. Other writings may be avoided by proof of fraud of the same character, or fraud independent of the writing, such as goes to the consideration, in whole or in part, or such as authorizes a rescission. Where the fraud goes to the execution, the writing never had any binding force, because the parties never assented to it; and in the other class of cases, the agreement is admitted, but is not enforced on account of a failure of consideration, or its effect is avoided by fraud warranting a rescission. The fraud which will avoid the effect of a writing, must be the fraudulent insertion of something contrary to the intention of the parties.—Paysant v. Ware & Barringer, 1 Ala. 160; Smith v. Williams, 1 Mer. 126; Jarvis v. Palmer, 11 Paige, 650.

3. If there was an intentional misrepresentation, it was in relation to a matter of law, which, in the absence of any confidential relation or inequality of condition between the parties, does not avoid the contract; every man

being presumed to know the law.—Lewis v. Jones, 10 Eng. Com. L. R. 393; 1 Story's Equity, §§ 200, 202; Platt v. Scott, 6 Blackf. 389; Russell v. Branham, 8 Blackf. 277. In Rivers & Portis v. Dubose, 10 Ala. 477, the misrepresentation was treated as if it related to a matter of fact; and the distinction between misrepresentations of fact and misrepresentations of the law was not noticed.

WATTS, JUDGE & JACKSON, *contra.*—1. Resort may be had to contemporaneous writings, connected by direct reference or necessary implication, for the purpose of varying the legal effect of a note.—Hunt v. Livermore, 5 Pick. 395; Davlin v. Hill, 11 Maine R. 434; also, Litchfield v. Falconer, 2 Ala. 280, and authorities there cited. For this purpose, the letter of plaintiffs was admissible.

2. The letter was also relevant to the question of fraud in the procurement of the guaranty, and the testimony of Rudler was corroborative of it.

3. Cowles having acted on the plaintiffs' representations as to the legal effect of the guaranty, the plaintiffs are estopped by these representations.—Rivers & Portis v. Dubose, 10 Ala. 477.

WALKER, J.—According to the settled law in this State, the guaranty sued on, which was made before the maturity of the note, imports an absolute engagement to pay the debt when due, in default of payment by the makers.—Donley v. Camp, 22 Ala. 659; Walker v. Forbes, 25 Ala. 139.

The guarantor, without contesting the law above stated, successfully resisted a recovery in the court below, by parol proof that, by the agreement under which the guaranty was given, he was to be liable only after a prosecution of the makers of the note "to judgment and insolvency;" and by proof that the payees had, by letter, requesting the execution of the guaranty, represented to the defendant that the guaranty, if executed, would not give recourse against him by the holders of the paper,

until they "had gone to the end of the law against the makers."

It is argued for the appellants, that the proof thus made available to the appellee, was inadmissible, because its effect was to vary the written contract of the guaranty. This argument the defendant contests; but for him it is also urged, that, conceding the testimony to have been inadmissible in that point of view, it was at least proper evidence upon the question of the fraudulent procurement of the guaranty. For the plaintiffs it is argued, in reply to this last position, that whatever misrepresentation was made, pertained to the law of the contract, and, therefore, does not constitute a fraud.

Neither the oral evidence given by the witness Rudler, as to the agreement under which the guaranty was given, nor the letter of the plaintiffs, as to the effect of the guaranty, was admissible for the purpose of varying the written contract of guaranty, or giving to it a different effect from that which the law assigns to it. When the parties have committed their contract to writing, it is presumed that they have agreed upon the writing as the expositor of the terms of the contract; and it cannot be varied by any antecedent parol stipulations, or by any representations made through the medium of a letter. This principle is now too well recognized and understood to require further support than is afforded by a reference to some of the decisions of this court.—Hair v. LaBrouse, 10 Ala. 548; Cowles v. Townsend & Milliken, at the last term; Holt v. Moore, 5 Ala. 521; Holley v. Younge, 27 Ala. 203; Waddell v. Glassell, 18 Ala. 561; West v. Kelly, 19 *ib.* 353; Hogan v. Smith, 16 *ib.* 600; Carlton v. Fellows, Read & Co., 13 *ib.* 437. The inconsistency of the evidence with the writing, however, was no objection to its admissibility in reference to the question of fraud in procuring the execution of the guaranty by the defendant. If the evidence conduced to show fraud, it was clearly admissible; and its admissibility in that point of view, did not depend on its correspondence with the written contract. If the evidence was relevant and pertinent to the question of fraud, it was competent.

3. It is certainly the law, that a mere misrepresentation of the *legal* effect of the guaranty would not constitute a fraud. The principle, and the reason of it, are thus stated in Chitty on Contracts: "Nor does a misrepresentation as to the legal effect of an agreement avoid the same, as against a party who has been induced by such misrepresentation to enter into it; for (every man being supposed to know the legal effect of an instrument which he signs) such misrepresentation must be taken to be of a matter within his own knowledge."—See Chitty on Contracts, (9th Am. from the 5th London edition,) 591–592. The same principle was asserted in the case of Lewis v. Jones, 4 B. & C. 506, (10 E. C. L. 393,) in which it was held, that a false representation as to the effect of signing a composition agreement in favor of an insolvent debtor, upon one bound for the debt, did not constitute a fraud. In an Indiana case, where a note was given for the purchase of a land-warrant, it was decided, that a false representation as to the acts of Congress governing the location of land-warrants was not fraudulent, because, in the language of the court, "It is considered that every person is acquainted with the law, both civil and criminal, and no one can therefore complain of the misrepresentations of another respecting it."—Platt v. Scott, 6 Blackf. 389. Of the same import is the subsequent decision in the same State of Russell v. Branham, 8 Blackf. 277. The decision in the case of Starr v. Bennett, 5 Hill, 303, asserts the same doctrine, in reference to an action of deceit against an officer, for a misrepresentation of the legal effect of his return. The principle we have stated is also sanctioned by Parsons, in his work on Contracts.—See 2d vol., page 270, note y; see, also, Craig v. Blow, 3 Stewart, 452; Jelks v. McRae, 25 Ala. 440; Cooke v. Nathan, 16 Barb. 342.

The authorities recognize as the basis of the law upon this subject, that a misrepresentation, in a matter of mere judgment equally open to the inquiries of both parties, is not a fraud. The misrepresentation of the legal effect of the guaranty was, from the very nature of it, but the expression of an opinion upon a question of law equally

open to the inquiries of both parties, and as to which the law presumes that the defendant had knowledge.—Juzan v. Toulmin, 9 Ala. 682; Munroe v. Prittchett, 16 *ib.* 789; Addison on Con. 128.

We do not regard the decision in Rivers & Portis v. Dubose, 10 Ala. 477, as an authority against the views above expressed by us. In that case, the distinction between a misrepresentation as to a matter of law and as to a matter of fact was not noticed. The misrepresentation was evidently treated and regarded as one of fact. Upon the supposition that the misrepresentation was as to a matter of fact, the opinion was correct. It may be that the court erred in regarding the misrepresentation as pertaining to a matter of fact; but, be that as it may, we will not attribute to the court the position that a misrepresentation of the law was of itself a fraud, when it does not appear that they deemed it a misrepresentation of law, and when such a decision would be so palpably at war with principle and authority. If we regarded it as going the length supposed, we could not follow it without departing from a plain and well established principle of law. It is clear upon authority and reason, that a party is not estopped by a misrepresentation of the law.—Brewster v. Striker, 2 Comstock's Rep. 19; Jelks v. McRae, 25 Ala. 444.

Notwithstanding a misrepresentation as to a matter of law does not, *per se*, constitute a fraud; yet other circumstances, concurring with such misrepresentations, may make it a fraud. If any peculiar relationship of trust or confidence existed between the parties, and the plaintiff has availed himself of such trust or confidence to mislead the defendant, by a misrepresentation as to the legal effect of the contract, it would constitute a fraud. So, if the defendant was in fact ignorant of the law, and the other party, knowing him to be so, and knowing the law, took advantage of such ignorance, to mislead him by a false statement of the law, it would constitute a fraud. 1 Story's Equity, §§ 197–198; 2 Parsons on Con. 270; Juzan v. Toulmin, *supra;* Munroe v. Pritchett, *supra;* Cook v. Nathan, 16 Barb. 342.

The parol evidence objected to, and the letter of plaintiffs, were pertinent and relevant to the question of fraud; and, although of themselves they did not establish fraud, they constituted a link in the chain of evidence necessary to prove it; and it would have been improper for the court to have rejected them when offered. They should have been admitted; and if no other evidence on the point was adduced, the court should, when the evidence was closed, have excluded the evidence.—Spears v. Cross, 7 P. 437; Cuthbert v. Newell, 7 Ala. 457; LaRoque v. Russell, *ib.* 798: Inerarity v. Byrne, 8 P. 176; Mardis v. Shackelford, 4 Ala., 493; Crenshaw v. Davenport, 6 Ala. 390.

We cannot assent to the argument of the appellants' counsel, that a fraud in the misrepresentation of the legal effect of the contract, in a material particular, would not vitiate it. We understand the rule to be, that fraud will always avoid a contract, when the party affected by it has taken no benefit from it, and has not ratified it; and therefore, if a fraud in the misrepresentation of the law, according to the principles laid down in this opinion, should be shown, it would avoid the contract.—2 Parsons on Contracts, 264; Story on Contracts, § 495; Chitty on Contracts, 586–587.

The entire evidence is set out in the bill of exceptions. Construing the two charges asked by the plaintiff in reference to the evidence, it is clear that they were correct according to the principles laid down in this opinion. The court erred in the refusal to give those charges; and for that error, the judgment of the court below is reversed, and the cause remanded.

DURDEN AND WIFE *vs.* McWILLIAMS & SMITH.

[ACTION AGAINST HUSBAND AND WIFE FOR NECESSARIES FURNISHED FAMILY.]

1. *What law governs liability of wife's separate estate for articles of family supply.* In an action against husband and wife, for articles of family supply furnished since the 17th January, 1853, the liability of the wife's separate estate is to be determined by the provisions of the Code, (§§ 1987, 1997,) although such estate accrued to her under the act of 1850.
2. *For what articles wife's separate estate is liable.*—Under the Code, (§ 1987,) the wife's separate estate is liable, in an action at law, for "articles of comfort and support of the household, suitable to the degree and condition in life of the family," such as the husband might have been charged with, at common law, *in invitum;* including necessaries for the common use of the household, but not articles purchased for the husband's individual or exclusive use.
3. *Sufficiency of complaint.*—In an action against husband and wife, seeking to charge the wife's separate estate with necessaries furnished to the family, the complaint must allege under what statute the liability is claimed.

APPEAL from the Circuit Court of Autauga.
Tried before the Hon. C. W. RAPIER.

THIS action was brought by the appellees, against Charles W. Durden and Martha, his wife; the complaint being as follows:

"The plaintiffs claim of the defendants the sum of $130, due by account on the 1st January, 1857, for goods, wares and merchandise sold and delivered by plaintiffs to defendants, on said 1st January, 1857, at their special instance and request. And plaintiffs aver, that the said defendants, at the time of the sale and delivery of the said goods, wares and merchandise, were living together as man and wife, in the county aforesaid; that the articles so sold and delivered, as aforesaid, were articles of family supply, used by them in their family, and suitable to their estate and condition in life, and for which the husband (said Charles W. Durden) would be liable at common law; and that the said Martha E. Durden, then and now the wife of said Charles W. Durden, was, at the time the said articles were so sold and delivered, possessed of a separate

property or estate, separate and apart from the estate of her said husband, secured to her by and under the provisions of the acts of the legislature of said State of 1848 and 1850, securing to married women their separate estates; which sum of money, together with the interest thereon, is now due."

To this complaint a demurrer was interposed by Mrs. Durden, on the following grounds: "1st, that the complaint does not set forth how, when, and in what manner she obtained the separate estate, nor state the facts which show that it was a separate estate under the law of 1848 or 1850; 2d, because this is charged simply as a legal conclusion; 3d, because the complaint does not allege under which act of the legislature—whether the law of 1848, or that of 1850—said estate is held; 4th, because said complaint does not show in what the alleged separate estate consisted, nor the amount of it; and, 5th, because said complaint does not show that the defendant Martha E. purchased the said articles in the account alleged." The demurrer was overruled.

On the trial, as the bill of exceptions shows, the plaintiffs introduced evidence, tending to show that the articles embraced in the account, a copy of which is made an exhibit to the bill of exceptions, "were purchased at the times therein stated, and were suitable to the defendants' estate and condition in life; that the prices were reasonable; also, that Mrs. Martha E. Durden was, at the time of the purchase, the wife of the said Charles W. Durden, and owned a separate estate of about $5,000 worth of property, acquired by descent from her father's estate in 1851. The proof showed, that the tobacco, cigars, pantaloons, boots, caps, fiddle-strings, hats, fish-hooks and lines, breastpin, and bottle of brandy, were purchased by and for the use of said Charles W. Durden, and were used by him as a member of the family."

"Upon this evidence, the court charged the jury, that if they believed the testimony, the defendant Martha E. Durden was liable to pay for all the articles charged in said account, out of her separate property. To this charge the defendant Martha E. excepted, and requested

the court to charge the jury, that although they believed that the cigars, fiddle-strings, tobacco and breast-pin were used by the defendant [Charles W.] as a member of the family, and were suitable to the defendants' estate and condition in life, yet the separate estate of the defendant Martha E. was not responsible for said articles; which charge the court refused to give, and the defendant Martha E. excepted."

The overruling of the demurrer to the complaint, the charge given, and the refusal of the charge asked, are now assigned as error.

WATTS, JUDGE & JACKSON, for the appellants.
ELMORE & YANCEY, and W. H. NORTHINGTON, *contra.*

STONE, J.—The act of March 1, 1848, section 5; the act of February 13, 1850, section 7, and section 1987 of the Code, are not precisely alike in all their features. The act of 1848 declares, "that for all articles of family supply, or used in the family, the husband shall be severally, or the husband and wife jointly, liable and suable at law."—Pamph. Acts, 79. The language of the act of 1850 is, "that for all articles of family supply, or used in the family, which are suitable to the estate and condition in life of the family of such husband and wife, and for which the husband would by the common law be liable, the husband shall be severally, and the husband and wife jointly, liable and suable at law."—Pamph. Acts, 65. The Code (§ 1987) enacts, that "for all contracts, for articles of comfort and support of the household, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law, the separate estate of the wife is liable; to be enforced by action at law against the husband alone, or against the husband and wife jointly."

We, in this opinion, propose to point out only two differences in the above enactments. First, the act of 1848 omits the qualifying clause, "*for which the husband would be responsible at common law,*" while each of the other statutes contains it in substance. Second, both the acts

of 1848 and of 1850 declare, that the *wife*, owning a separate estate, shall be *liable;* while the Code simply enacts, that the *separate estate* of the wife is liable. The record in this case shows that the estate of Mrs. Durden accrued to her under the act of 1850; and hence we will not now declare the rule governing the liability of estates made made separate by the act of 1848, further than is after shown.

Without undertaking to point out, to a greater extent than is above done, the differences in the extent of liability under the several statutes—viz., the act of 1848, the act of 1850, and the Code—it is manifest that each successive statute, if it render a different construction necessary, rather limits the liability of the wife's separate estate, while neither imposes any new burden not given by the former.

The articles which make up the account which is the subject of the present suit, were all purchased in 1856, after the Code went into operation. It becomes, then, necessary that we should construe section 1997 of the Code, which reads as follows: "The provisions of this article take effect, and are operative, on the estates of all married women who have been married, or have received property, by descent, gift or otherwise, since the first of March one thousand eight hundred and forty-eight." Under these facts, we hold, that the liability of Mrs. Durden's separate estate, in an action at law, must be governed by section 1987 of the Code, notwithstanding her estate accrued to her under the act of 1850.—Weems v. Bryan, 21 Ala. 305.

In Cunningham v. Fontaine, 25 Ala. 644, we considered the question of the wife's liability at law under the act of 1850. In Daniels v. Sprague and Wife, at the present term, we considered the same question under the provisions of the Code. See, also, Henry v. Hickman, 22 Ala. 685. In neither of these cases did we undertake to define or determine what *contracts*, or what description of articles of *family supply*, or of *comfort* and *support of the household*, can become a charge upon the wife or her separate estate,

on account of which she is suable at law. The present record raises this precise question.

The Code, in defining the class of articles for which the wife's separate estate is liable in an action at law, contains three qualifying clauses: 1st, they must be articles of *comfort* and *support* of the household; 2d, they must be suitable to the *degree* and *condition* in life of the family; 3d, they must be articles "for which the husband would be responsible at common law." We think each of these qualifying clauses must have some operation, and that, collectively, they are indicative of the vigilance with which the legislature intended to guard this species of property. Clauses 1 and 2 need no particular comment here. We regard clause 3 as the most significant and controlling. If we construe this language in its larger and more general sense, the result will be to subject the wife's separate property to the payment of every valid contract the husband may make; because, upon every contract of his own, supported by a valuable consideration, he would be responsible at common law. This construction would defeat the entire object of the statutes. We can not for a moment believe the legislature had this intention.

Neither do we find any thing in the statutes which authorizes us to confine the liability of the separate estate to contracts entered into by the wife herself, or which renders the *agency* by which the contract is entered into a material inquiry, further than is implied in the rule hereinafter stated.

Having shown that the third qualifying clause is not to be construed in its larger sense, we must seek for it a more restricted meaning. We hold, that the intention of the legislature was, to render the wife's separate property liable, in an action at law, for only such "articles of comfort and support of the household" as the husband may be chargeable with *in invitum;* such necessaries for the maintenance and comfort of the family, as, in the absence of proper provision by him, his wife, or even a stranger, may supply to the family, and thereby fix a liability on him. We will not here undertake to lay down a definite and

precise rule for every case that may arise. The subject is treated in Zeigler v. David, 23 Ala. 127; Wray v. Cox, 24 Ala. 337; Cothran v. Lee, 24 Ala. 380; 1 Parsons on Contracts, 253, *et seq.*; *ib.* 286, *et seq.*; 2 Bright on H. & W. 10.

Under the rule above declared, the separate estate of the wife can not be charged, in an action at law, for the wearing apparel of the husband, or any other article purchased for his individual or exclusive use. For articles which, in their nature, are used in common, and which are necessaries of the household in its collective capacity, the separate estate of the wife is chargeable. The fact that the husband participates in the use and enjoyment of the articles last mentioned, will not in the least diminish the liability of the wife's separate estate.

The construction above given will operate no hardship, either upon the husband, or any one who trusts him. He has the rents, income and profits of his wife's separate property, without liability to account for the same; and the law has given him no authority to charge the *corpus* of her estate, to a greater extent than is above expressed. Code, § 1983; Pickens v. Oliver, 29 Ala. 528.

It will be observed, that the question we are discussing, is the liability of a married woman's separate estate in an action at law. Of course, she has power to charge it in equity, independent of our statutes.

From what we have said above, it necessarily results, that the judgment pronounced by the circuit court in this case must be reversed. We deem it unnecessary to notice every point presented by the record. A complaint which seeks to charge the separate estate of a married woman, in an action at law, should aver under which statute the liability is claimed; because, as we have shown, the statutes are somewhat different.

Whether the articles purchased are of the class which can be charged on the separate estate, is a question for the jury, under appropriate instructions.

The judgment of the circuit court is reversed, and the cause remanded.

SPRAGUE AND WIFE *vs.* DANIELS, ELGIN & CO.

[ACTION AGAINST HUSBAND AND WIFE, ON PROMISSORY NOTE AND ACCOUNT.]

1. *Sufficiency of complaint.*—In an action against husband and wife, under the Code, (§ 1987,) a complaint in these words: "Plaintiffs claim of defendants $551, due by promissory note drawn by said defendants, dated January 17, 1855, and payable sixty days after date, in favor of plaintiffs; also, the additional sum of $355, due by account, for goods, wares and merchandise, for family supplies sold by plaintiff to said defendants, at divers times prior to the 1st January, 1855, to 31st January, 1855, inclusive; which said sums of money, amounting to $906, together with the interest and costs, are due and unpaid,"—shows no cause of action against the wife, and is substantially defective on error, although no objection to it was interposed in the court below.
2. *Judgment reversed and remanded.*—In reversing a judgment on *nil dicit* against husband and wife, because the complaint shows no cause of action against the wife, the appellate court cannot itself render the proper judgment, but will reverse the judgment *in toto*, and remand the cause to the primary court.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. MCKINSTRY.

THE complaint in this case was as follows:

"Lewis Daniels and Armstead M. Elgin, partners under the firm name and style of Daniels, Elgin & Co., plaintiffs, claim of the defendants, Alonzo M. Sprague and Elizabeth C., his wife, $551 56, due by promissory note drawn by said defendants, dated at Mobile, January 17, 1855, for said amount, and payable sixty days after date, at the Bank of Mobile, in favor of plaintiffs; also, the additional sum of $355 85 due by account, for goods, wares and merchandise, for family supplies sold by plaintiffs to said defendants, at divers times prior to the 1st January, 1855, to 31st January, 1855, inclusive; which said sums of money, amounting to $907 41, together with the interest and costs, are due and unpaid."

The summons was issued on the 13th April, 1855, and was executed on both defendants on the 16th April. On the 8th June, a judgment by *nil dicit* was entered against

both the defendants, and a writ of inquiry awarded. The transcript next sets out a "note by the clerk," in these words: "I find the following pleas on the summons and complaint, after the above judgment." The pleas are in these words: "Defendant comes, and pleads payment, set-off, and the general issue, in short by consent;" but the time of filing them is nowhere shown. On the 16th January, 1856, a writ of inquiry was executed, and judgment was entered up for the plaintiffs, against "the defendants," for $971 41, the damages assessed by the jury. From this judgment both the defendants took an appeal on the 4th April, 1856; and they jointly assign as error—1st, "the rendition of judgment by *nil dicit* before the time of imparlance given by the statute had expired;" 2d, "the rendition of judgment by *nil dicit* when there was a plea on file;" 3d, "the proceeding to inquire of damages, as shown in the record, and rendering judgment thereon, as shown;" 4th, "the rendition of judgment when the complaint does not show a sufficient cause of action;" and, 5th, "that an action does not lie, such as is set forth in the summons."

The transcript also contains another judgment, rendered on the 5th June, 1856, by which the former judgment of 16th January was amended, *nunc pro tunc*, so as to make it a judgment on verdict on issue joined between the parties. A motion was made by the appellants, to strike this last judgment from the record, on the ground that it constituted no part of the cause, and was improperly inserted.

Geo. N. Stewart, for the appellants.

O. S. Jewett, *contra*.

RICE, C. J.—Husband and wife are here jointly sued, upon a note alleged to have been made, and an account alleged to have been contracted by them, *since the Code went into effect*. The case, then, must be determined by the Code, and not by the statute of February 13th, 1850, (Pamph. Acts 1849–50, p. 65,) which was materially different from the Code, so far as a case like the present is concerned. In certain specific cases, the act of 1850

declared, that "the husband shall be severally, and the husband and wife jointly, *liable and suable at law.*"—Henry and Wife v. Hickman, 22 Ala. R. 685; Cunningham v. Fontaine, 25 *ib.* 644. The Code makes no such provision or declaration, but provides as follows: "For all contracts, for articles of comfort and support of the household, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law, *the separate estate of the wife* is liable; to be enforced by action at law against the husband alone, or against the husband and wife jointly."—Code, §§ 1987, 1988.

The authority given by section 1987 of the Code, above copied, for suing the wife, at law, with her husband, is given only as a means of enabling the owner of such a contract as is therein provided for, to subject her separate estate to its payment.—Cunningham v. Fontaine, *supra.* The separate estate here referred to, is that made so by statute. The complaint in this case does not show any contract embraced by that section, nor that the wife has any separate estate. It shows no cause of action whatever against the wife, and no right to make her a defendant in the suit.—Gibson v. Marquis and Wife, 29 Ala. R. 688, and authorities cited *supra.*

The judgment is clearly erroneous, as to the wife; and we do not see how we can withhold a reversal as to the husband. We cannot know that, in executing the writ of inquiry, a larger amount of damages was not assessed, than would or ought to have been assessed, if the wife had not been a defendant. The damages, as assessed, were assessed against both husband and wife. We cannot know how much should have been assessed against the husband, if he had been the only defendant. We cannot, therefore, reverse and render. The only way in which we can give the law its due course, is to reverse the judgment in *toto*, and remand the cause to the court below, in which it may be put in such a condition that right and justice may be administered according to law.—See Hall v. Cannte and Wife, 22 Ala. R. 650; Gibson v. Marquis, *supra.*

Judgment reversed, and cause remanded.

McCONEGHY *vs.* McCAW.

[TROVER BY FEME COVERT FOR CONVERSION OF SLAVE.]

1. *Sale of mortgaged property under execution against mortgagor.*—Under section 2455 of the Code, the interest of one who has conveyed a slave, by bill of sale absolute on its face, as a mere security for the payment of a debt, may be sold under execution against him; and the sheriff must, of necessity, have the right to take the slave into his possession.
2. *Sheriff's liability in trover for abuse of lawful authority.*—If a sheriff sells the entire property in a slave, under execution against the mortgagor, he is liable in trover at the suit of the mortgagee; and the plaintiff in execution, who indemnified the sheriff to make the sale, and who received the entire purchase-money, is equally liable.
3. *When wife may sue alone.*—The wife may maintain trover in her own name, without joining her husband, for the conversion of a slave which she claims as part of her separate estate under the "woman's law" of 1850.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. McKINSTRY.

THIS action was brought by Mrs. Martha E. McConeghy, wife of William McConeghy, against Hugh McCaw, to recover damages for the conversion of a slave named Dick, which the plaintiff claimed as a part of her separate estate, under the facts hereinafter stated, and which the defendant induced the sheriff of Mobile to sell under execution against said William McConeghy. A plea in abatement, on account of the non-joinder of the plaintiff's husband, was interposed by the defendant, but does not appear to have been acted on by the court; and the cause was tried on issue joined on the plea of not guilty.

It appeared from the evidence adduced on the trial, as the same is stated in the bill of exceptions taken by the plaintiff, that the plaintiff and her said husband were married in May, 1849; that the slave in controversy, prior to said marriage, "was once the property of said William McConeghy, but the bill of sale was held as security by one Blair, who also had the slave in his possession, though said McConeghy collected the hire; that in April, 1850, Blair, being about to remove to California, applied to Dr.

E. H. Kelly, to take the negro, and stand in his shoes in relation to him, saying that $250 was due to him on the negro; that Kelly, to accommodate Blair, agreed to this, and paid him $250, and executed his note for $200 more, and took a bill of sale for said negro as security for said money; that the note was handed back immediately to said Kelly; that it was then understood, that Kelly was to keep the negro until said McConeghy paid him the $250, and was to have the slave's services for the use of his money; and that all this took place in April, 1850." The bill of sale from Blair to Kelly, which is made an exhibit to the bill of exceptions, is absolute in form, and recites a consideration of $450.

"It was shown that the plaintiff, at the time of her marriage with said William McConeghy, had no property at all in possession; and that her said husband, who is still alive, was then largely indebted. Plaintiff introduced evidence tending to show that, in 1849 and 1850, he was without means, and had to labor for their support; but the defendant introduced proof which tended to show the contrary. In the spring of 1850, said William McConeghy went to South Carolina, to obtain an interest in some property conveyed to her from her grandfather's estate, but failed to get it. In October, 1850, he went again, and recovered from her executors (?) $368 in money, and four slaves, three of whom he brought with him to Alabama on his return; the fourth, whom he did not bring, being of no value. On his return, or within a short time thereafter, plaintiff paid $250 to said Dr. Kelly, and took from him a bill of sale for said slave," (which is appended as an exhibit to the bill of exceptions, and which is absolute in form, and recites a consideration of $450,) "and the slave was delivered to her. Her husband afterwards mortgaged said slave, as her agent, to raise money for himself, to one James Kelly; and left said slave with Kelly, together with another slave which she received from her grandfather's estate, to hire out, and, from the hire, to pay the money borrowed by her husband. Said James Kelly took possession of said slaves, and hired them out until his mortgage debt was paid; and still con-

tinued to hire them as plaintiff's agent. There was no evidence that these deeds had been recorded, under the act of 1850, or any other act. It was shown that said slave was worth from $400 to $450; that the defendant, having a decree against said William McConeghy for a large amount, indemnified the sheriff, and had said slave sold under execution in 1855; that the slave was purchased at the sale by one McGuire, for over $600; and that the defendant received all the proceeds of sale, except the costs. There was no direct proof that the plaintiff had any knowledge of her husband's indebtedness, or of the terms or conditions on which the slave was held by Dr. E. H. Kelly."

"The court charged the jury, among other matters, that if they believed the purchase made by plaintiff was a purchase, and with her own funds, acquired since 1848, then she was entitled to recover; but, if they believed that Dr. Kelly's title was a mere mortgage, and that plaintiff's title was a mere mortgage, and that she knew it to be so when she paid the money, then she could not recover of the defendant in this action, although he had received all the money at the sheriff's sale: that to assert such a right, if she had any, she would have to bring a suit in equity, or sue the purchaser of the slave at law."

This charge, to which the plaintiff excepted, is the only matter assigned as error.

E. S. DARGAN, for the appellant.

CHANDLER, SMITH & HERNDON, *contra.*

WALKER, J.—It is declared by the Code, (§ 2455,) that executions may be levied on an equity of redemption, in either land or personal property, *and that* when any interest less than the absolute title is sold, the purchaser is subrogated to all the rights of the defendant, and subject to all his disabilities. There certainly remains in one who absolutely conveyed a slave, as a mere security for the payment of a debt, "*an equity of redemption.*" Chancellor Kent, in reference to conveyances absolute in form, yet designed to have effect as mortgages, says: "When it

is once ascertained that the conveyance is to be considered and treated as a mortgage, then all the consequences, appertaining in equity to a mortgage, are strictly observed, and *the right of redemption* is regarded as an inseparable incident."—4 Kent's Com. 143. This court, in many decisions, has declared an absolute conveyance, intended only as a security, to be in effect a mortgage, with an equity of redemption in the party making the conveyance. Parish v. Gates, 29 Ala. 254; English v. Lane, 1 Porter, 328. The interest remaining in one who has made an absolute conveyance for the security of a debt, is an equity of redemption, and certainly within the letter of the statute.

Looking beyond the letter, we find no sufficient reason for the conclusion that it is without the spirit of the law. It is true that such an equity of redemption was precluded from the cognizance of a court of law by a rule of evidence, and was susceptible of establishment only in a court of equity. But we cannot say that the legislature designed to observe this wholesome rule of evidence, and to restrict the operation of the statute to equities of redemption evidenced by writing. In construing the part of the law which relates to equities of redemption, we must look at the first clause found in the same section, which authorizes a levy on real property, to which the defendant has a legal title, or a perfect equity, having paid the purchase-money. Under it, the interest of one who has made a parol purchase of land, paid the purchase-money, and entitled himself to a specific performance, might be sold under execution; yet the statute of frauds has always been an insuperable barrier to establishment by parol, in a court of law, of a purchase of land. The purchaser by parol, who has paid the purchase-money, and is entitled to a specific performance, certainly has a perfect equity, and his interest must necessarily come within the operation of the statute. Since the legislature has, in the first clause of the statute, disregarded the distinction, as to the evidence requisite to prove a purchase of land at law and in equity, we are led to impute to it a similar design in the last clause.

There seems to be a similar statute in Kentucky; and it is held by the court of appeals in that State, that the sheriff, being by the law authorized to levy and sell, must, of necessity, have the right to take the property into his possession, and exhibit it at the sale.—Philips v. Morris, 7 J. J. Mar. 279; McIsaacs v. Hobbs, 8 Dana, 270. The same right must be allowed the sheriff in this State; for, without taking possession, he could not levy and sell. Whether it would be the duty of the sheriff, after the sale, to restore the property to the mortgagee, if in his possession at the time of the levy, it is not necessary for us in this case to inquire.

2. The court charged the jury, that if the plaintiff's title was a mere mortgage, and she knew it to be so when she paid the money in consideration of which she obtained the title, then she could not recover in the action, although the defendant had received all the purchase-money at the sheriff's sale. Because it was lawful for the sheriff to levy upon and take possession of the property for the purpose of the sale, and for the defendant to cause him to do so, no cause of action accrued to the plaintiff, against either the sheriff or the defendant, in consequence of the levy and taking of the property. The charge was, therefore, correct, unless some subsequent act made the defendant a tort-feasor. Now, although the sheriff may levy upon and take into possession mortgaged personal property, by virtue of a *fieri facias* against the mortgagor; yet the equity of redemption is alone liable to levy and sale. If he should sell the entire interest in the property, his sale would include the right of the mortgagee, as well as of the mortgagor. The evidence in this case conduces to show, that the sheriff did not restrict his sale to the equity of redemption, or to such interest as might be in the defendant in execution, but sold the entirety of the property in the negro. The court could not, therefore, assume that the sheriff did not sell the interest of the plaintiff as mortgagee, as well as the interest of the defendant as mortgagor. If he did so, he was a wrong-doer in reference to the plaintiff, and liable in an action of trover, upon the principle settled in the cases of Smyth

v. Tankersly, 20 Ala. 212, and Parminter v. Kelly, 18 Ala. 716.—See, also, O'Neal v. Wilson, 21 Ala. 288; White v. Morton, 22 Verm. 15; Melville v. Brown, 15 Mass. 82. The evidence also conduces to show that the defendant procured the sheriff to make the sale which he did make, by indemnifying him, and received the entire purchase-money arising from the sale of the entirety of the property. Upon those facts, the defendant would be equally with the sheriff guilty of the conversion.—1 Chitty on Pleading, 79, 80; Calkins v. Lockwood, 17 Conn. 154; Clifton v. Grayson, 2 Stew. 412.

3. We regard the question of the right of a feme covert to maintain an action of trover, for the conversion of her separate estate, as settled by the decision in the case of Pickens v. Oliver, 29 Ala. 528.

The judgment of the court below must be reversed, and the cause remanded.

DAVIDSON *vs.* WILEY, BANKS & CO.

[MOTION AGAINST CIRCUIT CLERK FOR FAILURE TO ISSUE EXECUTION.]

1. *Suspension of execution by order of court.*—A general order of the circuit court, granting to the clerk twenty days, in addition to the time allowed by the statute, for issuing executions, excuses the clerk for failing to issue execution within the time prescribed by the statute.—Code, § 2423. (STONE, J., *dissenting*, held the order void.)

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. WM. S. MUDD.

THIS was a motion for a summary judgment, under section 2619 of the Code, against the appellant and his sureties on his official bond as clerk of the circuit court of Jackson county, for his failure to issue an execution, within the time prescribed by law, on a judgment which the plaintiffs

had obtained, at the March term, 1855, of said court, against J. M. & W. J. Greene. The term of the court at which said judgment was rendered, commenced on the 19th March, and closed on the 29th day of the same month, which was Thursday of the second week. No execution was issued on plaintiffs' judgment until the 18th April, though executions on several other judgments against the same defendants were issued on the 2d April. The defendants in execution were in failing circumstances, and all their property was appropriated to the satisfaction of the executions first issued, which were levied immediately. In excuse of the failure to issue execution on plaintiffs' judgment at an earlier day, the defendants in the motion relied on an order made by the circuit judge on the last day of said March term, and entered on the minutes, in these words: "Ordered by the court, that twenty days, in addition to the time allowed by the statute, be allowed the clerk of this court, for the issuance of execution." Upon this evidence, the court charged the jury, "that if they believed all the evidence, they must find a verdict for the plaintiffs;" to which charge the defendants excepted, and which is now assigned as error.

WALKER, CABANISS & BRICKELL, and N. ROBINSON, for the appellant.—The order of the court, although it may have been erroneous or unauthorized, was a sufficient protection to the clerk, who is a mere ministerial officer, and who cannot be considered in default when his conduct conforms to the orders of the court. For analogous cases, see Carson v. Walker, 16 Mo. (1 Bennett,) 68; Bacon v. Cropsey, 3 Selden, 195; 10 Ala. 101; 23 Ala. 143. But the order was neither unauthorized nor erroneous. The issuing of execution is a mere ministerial act. Is the time of issuing it anything more than a matter of practice, and, as such, under the controlling power of the court by virtue of its inherent jurisdiction, independent of statutory provision? As to the power of courts in controlling matters of practice, see Bartholomew v. Carter, 3 Man. & Gr. 123, (42 E. C. L. 73;) Saunders v. Coffin, 16 Ala. 422. However this may be, the statute clearly contemplates

the exercise of such a power by the courts, and confers the power if it did not before exist; otherwise, no force or effect can be attributed to the qualifying expression, (Code, § 2423,) "unless otherwise directed by law." If the court possesses no such dispensing power in certain emergencies, the clerk would not be excused for a failure to perform his duty, by the sudden invasion and occupation of the country by a foreign foe, or by an unlooked-for pestilence. If the power exists in any case, it must be presumed to have been properly exercised; at least, in the absence of evidence to the contrary.

ROBINSON & JONES, *contra.*—Neither the statute, nor the order of court, nor both together, can avail the appellants in this case. "Unless otherwise directed," as the expression is used in the statute, means a direction by the plaintiff or his attorney, who alone have the right to control his judgment and execution. The execution follows the judgment, and is a statutory right. If the court has the power to dispense with an express statutory requisition at all, the power must be unlimited; if an extension of time for twenty days can be granted, why may not an extension for an indefinite period? The order here relied on was general; applying to no particular case, and assigning no reason for its being made. It conferred no rights on the plaintiffs, and could neither take away any of their rights, nor impose any obligations on them. It was made on the last day of the term, without notice to them, and after they had left the court. They could take no step to rectify or annul it, as it was no part of their case, and would not have been embraced in a record of their case. That the order was void, as to plaintiffs, for want of jurisdiction, see Lamar v. Commissioners' Court, 21 Ala. 776; Foster v. Glazener, 27 Ala. 391; Owen v. Jordan, 27 Ala. 611.

STONE, J.—There is but a single question presented by this record: Did the order of the presiding judge, made and entered on the minutes at the March term, 1855, relieve the clerk from the duty of issuing execution in

this case, as required by sections 2423 and 2424 of the Code?

The language of the Code (§ 2423) is, "The clerk must issue executions on all judgments, in favor of the successful party, as soon after the adjournment of the court as practicable, within the time prescribed by this Code, *unless otherwise directed.*" The time prescribed for cases "where the court continues more than one, and less than two weeks," (§ 2424,) is "within ten days thereafter."

What are we to understand by the expression, found in section 2423, "unless otherwise directed?" The appellant contends, that the order of the circuit judge comes within its provisions. I can not assent to this construction. The right of a plaintiff, to have execution of his judgment, is a right given by law; and the court has no power over this question, beyond the express language of the law. The statutes nowhere, in terms, give the court power to stay executions; and if the legislature intended to confer that power on them, the words "unless otherwise directed," are very inapt to express that intention. The words, *unless the court shall grant further time to the clerk*, or words of similar import, would have left no ground for controversy or cavil; and I think the legislature would not have clothed a power as important as this is, in the ambiguous language that is here relied on.

Another argument against the construction contended for: If the circuit judge could, without any reason expressed in the order, suspend execution for twenty days, why could he not suspend the final process for as many months? Who can prescribe a limit to the power? And can these important results be accomplished by a general order, which mentions no case, and pertains to no specified judgment in the court? Suppose the presiding judge should improperly exercise this assumed power; how can his decision be reviewed? or how can a party injured by it obtain redress? If he bring his case by appeal to this court, this general order is no part of the record in his case, and he can assign no errors upon it.

I think the expression, "unless otherwise directed," has reference to judgments which, on their face, direct a

stay of execution; and the same principle would doubtless include cases where the party or his attorney directed the clerk not to issue execution. There may be other cases to which this principle would apply, but I do not think the appellant brings himself within the rule.

The principles asserted above are, in my judgment, conclusive to show that the circuit court had no authority to make the said order, and the same is absolutely void. Foster v. Glazener, 27 Ala. 391; Cobb v. Cooper, 15 Johns. 152; Harney v. Huggins, 3 Bail. 252.

My brothers, however, hold differently, and think the circuit judge had power to make the order. Under their opinion, the judgment of the circuit court is reversed, and the cause remanded.

RICE, C. J.—The legislature certainly had the constitutional power to authorize the circuit court to allow its clerk a longer time for issuing executions than the time prescribed in section 2424 of the Code; and we think such authority was conferred on that court by section 2423 of the Code. We are forced to that conclusion, by the well settled rule which requires effect to be given to every significant clause, sentence, or word in a statute. Smith's Com. on Statutes, 710.

The view taken of section 2423 of the Code by our brother Stone, seems to us to deny any effect whatever to the words "unless otherwise directed," employed in that section. For it is very clear that, if those words are expunged, that section will mean precisely what he thinks it means without expunging them. The right of the plaintiff, by his own directions, to relieve the officer from a compliance with the requisitions of the law as to the issue or service of his own process, is equally unquestionable, whether those words be treated as expunged or not expunged. That right had been so fully recognized, and so firmly established, long before the Code, *under statutes absolute in their terms, and free from any such words as "unless otherwise directed,"* that we cannot think those words were inserted in section 2423 of the Code with any reference to that right. The words were unnecessary for that

purpose; and if they mean merely that the plaintiff might, by his direction, relieve the clerk from issuing execution within the prescribed time, they mean nothing; as the plaintiff would have had that right without those words, under the other words of the section.—See Gary v. Boykin, 7 Ala. R. 154; Oswitchee Co. v. Hope, 5 *ib.* 629; Patton v. Hamner, 28 *ib.* 618, and cases therein cited.

The only way in which we can give effect to the words "unless otherwise directed," as used in section 2423 of the Code, is to treat them as meaning unless otherwise directed *by the court rendering the judgment.* We are forced to treat them as meaning that, or to deny to them any sense, meaning or effect. And we do not feel authorized to deny them any sense, meaning, or effect. Cases might possibly occur, in which it would be impossible for the clerk to issue executions on all judgments rendered at a term, within the number of days mentioned in the Code; as where, within three days after the end of the term, a public enemy should invade the county, and take the clerk and all its citizens and keep them for a month as prisoners. The legislature may have deemed it wise, in view of even extraordinary cases like that, to entrust to the court the power to allow the clerk a longer time for issuing executions than the time mentioned in the Code. Suppose that, near the end of the term of the court at which the judgments were rendered, under which it is here alleged the clerk failed to issue executions in due time, it had been proved to the court that there was imminent danger of an invasion of the county by a public enemy of overwhelming force; and that thereupon the clerk had asked for a longer time than that mentioned in the Code for issuing the executions; and that the court had granted the longer time,—would we be authorized to treat the grant as void? We think not. We think the legislature, in the exercise of its constitutional authority, has conferred the power upon the court to make such order. Section 2423 of the Code, as we construe it, is a regulation of the remedy. And from the very nature of the subject, a limitation is implied as to the power conferred. It exercise might be so unreasonable as to call for

the exercise of the superintending or revisory authority of this court.—See Chadwick v. Moore, 8 Watts & Serg. 49; Baugher v. Nelson, 9 Gill, 299.

RIDGWAY AND WIFE *vs.* McALPINE.

[BILL IN EQUITY FOR ALLOTMENT OF DOWER.]

1. *Dower not barred by statute of limitations.*—The act of 1843, (Clay's Digest, 329, § 93,) limiting "all actions for the recovery of lands, tenements, or hereditaments," to ten years after the accrual of the cause of action, does not apply to suits, either at law or in equity, seeking an allotment of dower.
2. *Nor by staleness of demand.*—Mere lapse of time short of twenty years, independent of other equitable circumstances, does not authorize a court of equity to treat a suit for dower as a stale demand.

APPEAL from the Chancery Court of Greene.
Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by the appellants, in November, 1854, seeking an assignment of Mrs. Ridgway's dower in certain lands, of which her former husband, George W. McAlpine, was seized and possessed during coverture, and which were aliened by him. The bill alleged, that the lands were sold and conveyed by said McAlpine, in the summer of 1838, to William McAlpine, the defendant in this suit, who was in possession of them when the bill was filed; that said George W. McAlpine died soon after said sale was made, and during the year 1838; that his widow has since married Rezin Ridgway, one of the plaintiffs; and that her dower in said lands has never been assigned to her. The defendant pleaded the statute of limitations in bar of the relief sought, and the plea was sustained by the chancellor.

The decree of the chancellor, in sustaining the plea of the statute of limitations, and dismissing the bill, is now

assigned as error, with other matters which require no particular notice.

TURNER REAVIS, and S. F. HALE, for appellants.—1. The general statute of limitations does not apply to suits for dower.—Angell on Limitations, 379; 4 Kent's Com. (5th ed.) 70; 10 Yerger, 339; 1 Dev. & Bat. Law R. 213; Park on Dower, 311; 4 N. H. 107; 3 N. H. 128; 8 Johns. 104; 1 Dud. (Geo.) R. 123; 2 Gill & J. 468; 1 Mann. (Mich.) 1; 1 Md. Ch. Dec. 271; 7 Geo. 20; 10 Geo. 321; 7 Metcalf, 24. It is the duty of the owner of the fee, and not of the dowress, to become the actor in the proceedings for the assignment of dower.—Shelton v. Carroll, 16 Ala. 148; Oakley v. Oakley, 30 Ala. 131. Until dower is assigned, a widow has no estate in the lands of her deceased husband, but only a mere right to have dower in them allotted to her. Before dower is assigned to her, she has not such an interest as can be sold under execution, even if she be in possession. She cannot sell and deliver her possessory interest to another, so as to enable him to defend an ejectment against the owner of the fee; nor can she, until dower is assigned, if out of possession, maintain ejectment.—Weaver v. Crenshaw, 6 Ala. 873; Cook v. Webb, 18 Ala, 810; Wallace v. Hall, 19 Ala. 367; Hunt v. Acre, 28 Ala. 580; Angell on Limitations, 380, note 6; Stephen's N. P. 1391. A proceeding for the assignment of dower, then, cannot be considered an "action for the recovery of lands, tenements, or hereditaments," within the meaning of the act of 1843.

2. The plea of the statute is uncertain and insufficient. 8 Porter, 227, 231; Andrews v. Huckabee, 30 Ala. 143.

3. The plea is defective, also, because it is not supported by a particular and precise denial in the answer of the facts alleged in avoidance of the statute.—3 Johns. Ch. 384; 8 Cowen, 360; 1 Bland, 282, 493; 3 Paige, 273; 11 Pick. 331.

4. The question, whether the claim is a stale demand, does not arise; because it is neither presented by the answer, nor by demurrer to the bill. If the question were presented, the authorities above cited, and the reasons on

which they are founded, show that the rule in respect to stale demands has no application. Dower is a strictly legal right, which a court of equity is as much bound to enforce as is a court of law, and upon the same principles; and if the right be not barred at law by the lapse of time, it cannot be in equity.—Potier v. Barclay, 15 Ala. 439; Blaine v. Harrison, 11 Illinois, 384; 1 Story's Equity, § 630; Oliver v. Richardson, 9 Vesey, 222; Chapman v. Schroeder, 10 Geo. 321. No case can be found in which the doctrine as to stale demands has been applied to a claim for dower, in less than twenty years; and those cases were decided without reference to the principles now contended for.

Jos. W. Taylor, and Wm. P. Webb, *contra.*—1. It must be conceded, that the lapse of time in this case is sufficient to bring it within the bar of the statute of limitations, and that the statute, if applicable to proceedings at law for the recovery of dower, is equally applicable to proceedings in equity for the same purpose. The question, then, is, whether the act of 1843, limiting "actions for the recovery of lands, tenements, and hereditaments," applies to proceedings at law for the recovery of dower. Dower is now, and always has been, recoverable at law, in this State, by petition, filed formerly in the circuit or county, now in the probate court. A petition for dower, under the act of 1812, (Clay's Digest, 172, § 3,) which remained in force until the 17th January, 1853, was an *action*, within the meaning of the act of 1843. It is included in the legal definition of an action.—Bacon's Abr., tit. *Action;* Co. Litt. 285. It possesses the three essential elements of an action—parties, a subject-matter of controversy between them, and a tribunal for its decision. It is identical in substance, and differs only in form and name from, a writ of dower at common law, which was undeniably an action. It is strictly analogous to the suit by petition and summons, (Clay's Digest, 331, § 102,) on a bond or note for the payment of money, which was clearly within the statute of limitations of 1843. It is, moreover, an action "for the recovery of lands, tene-

ments, and hereditaments." A *recovery* is the restoration of a right by the judgment of a court. The object of the petition for dower, like that of the writ of dower or writ of right of dower at common law, was to *recover* the widow's share of her husband's real estate, from the heir, devisee, or alienee of the husband; and its effect was to put her in possession of the dower lands. On the death of the husband, the possession of the party claiming from him becomes, *eo instanti*, adverse to the widow, *quoad* her portion of the lands; which adverse possession is divested by the judgment of the court, restoring her dower lands to her. The act of 1812, in prescribing the proceedings on the petition, makes them strictly analogous to ordinary actions at law; and uses the very words (*make recovery*) of the act of 1843. In confirmation of these views, deduced from the language of the statutes, and from the general nature of the claim of dower, the following authorities are referred to: Owen v. Slatter, 26 Ala. 547; Jones v. Powell, 6 John. Ch. 194; Terry v. Minor, Sm. & Mar. Ch. 489–94; Bogle v. Rowand, 3 Dess. 555.

2. The plaintiff's ignorance of the legal insufficiency of her relinquishment of dower, until after the completion of the statutory bar, does not avoid or prevent the operation of the statute.—24 Wendell, 605; 3 Litt. 177.

3. If the claim is not barred by the statute of limitations, it is at least a stale demand, and, for that reason, ought not to be allowed.—7 How. (U. S.) Rep. 234; 10 Vesey, 453; Adams on Equity, m. p. 228; 2 Story's Equity, § 1520, and authorities cited in marginal note; Jeremy's Equity, 47.

RICE, C. J.—The main question in this case is, whether a suit, at law or in equity, seeking the assignment of dower, is within the second section of the statute of limitations of 1843, which provides, that "all actions for recovery of lands, tenements, or hereditaments, in this State, shall be brought within ten years after the accrual of the cause of action, and not after: *Provided*, that five years be allowed, under both sections of this act, for infants, *femes covert*, insane persons, and lunatics, after the

termination of their disabilities, to bring suit."—Clay's Dig. 329, § 93.

It has been long settled in England, that the wife's remedy by action for her dower, is not within the ordinary statutes of limitations.—Park on Dower, 311; 4 Kent's Com. 70; Oliver v. Richardson, 9 Vesey, 222.

In several of the United States, whose statutes of limitations are as comprehensive as our own, it has been decided, that the suit by a widow for an assignment of her dower, no matter in what court instituted, is not within those statutes.—Wakeman v. Roache, 1 Dudley's Rep. 123; Tooke v. Hardeman, 7 Georgia R. 20; Chapman v. Schroeder, 10 *ib.* 321; Spencer v. Weston, 1 Dev. & Batt. R. 213; Campbell v. Murphy, 2 Jones' Eq. R. 357; Barnard v. Edwards, 4 New Hamp. R. 108; Guthrie v. Owen, 10 Yerger's R. 339; Parker v. Obear, 7 Metc. R. 24; Hogle v. Stewart, 8 Johns. R. 104; Ralls v. Hughes, 1 Dana's R. 407; May v. Rumney, 1 Michigan Rep. (by Manning,) 1.

The reasons upon which these decisions, English and American, have been mainly rested, are, that dower is highly favored; that the right to it is unlike any other right to land; that it "differs from all other mere rights of action, in not being the result of any adverse *jus possessionis* acquired by the heir or *feoffee;*" that its own distinguishing peculiarities, and the favor to which it has for so long a time been entitled by law, are sufficient to except and exempt a suit for the assignment and recovery of dower from the operation of all general statutes of limitations, however broad and comprehensive, which do not expressly name it, or include it by *unavoidable* implication; and that the leading policy and end and aim of such statutes are, to protect those in possession of real property, against claims held *adversely* to them by others out of possession, and can be accomplished without implying from broad and comprehensive words, as to actions for the recovery of lands, an intention on the part of those who enacted them to include a suit for the assignment and recovery of dower.—See, also, Wright v. Conover, 2 Halsted's Ch. Rep. 482.

In an investigation like that now in hand, it is essential to bear in mind the situation of a dowress before assignment of her dower.—See Park on Dower, 335, 11 L. L. "Although the title of dower is consummate," yet it is a title to be endowed, not of an undivided third part of the entirety, but of a third part in severalty. She cannot select the particular parcel or parcels which she shall have for her dower. The act of assigning to her a third part in certainty must be performed by some other person. Until assignment, her title of dower will not protect her against a recovery in ejectment, and is, for most purposes, nothing more than a right of action, and is not transferable in any other mode "than by release to the terretenant by way of extinguishment." She cannot exercise any act of ownership. She has no right of entry, no seizin, and no estate. Her situation "has no resemblance to that of a person who has become entitled to a particular estate by way of remainder or springing use," and bears no analogy "to the case of coparceners, or *other persons becoming entitled to undivided interests;*" but it is an anomalous case, "standing upon its own peculiar circumstances, and neither borrowing nor affording any analogies."—See Green v. Putnam, 1 Barbour's Sup. Ct. R. 500.

In Park on Dower, 335, it is expressly laid down, that "*the mere possession* of the heir or *feoffee* can never become a bar to the title of a wife." Why? Because "neither the title nor the possession" of the heir or feoffee "is *adverse* to that of the claimant of dower; nor is it in any way inconsistent with it. The title to dower is involved with, and inherent in," that of the heir or *feoffee:* the seizin and possession of either, "although for himself, inures also to the benefit of the claimant in dower." Guthrie v. Owen, 10 Yerger's Rep. 339; Hogle v. Stewart, 8 Johns. R. 104; and other cases *supra.* See, also, Dowdall v. Byrne, Batt. (Irish) Rep. 373, and the comments thereon contained in Angell on Limitations, (second edition,) 402, 403, and in the note on page 403.

To embrace a suit for the assignment and recovery of dower within the act of limitations of 1843 above cited, would be to make that act affect a claim which is not

adverse either to the heir or alienee of the husband, and to render the possession, one way or the other, altogether immaterial to the statutory bar. For, if the statute will, in behalf of the heir or alienee, "bar the widow at all, it will do so in a case where, the lands being wild, neither party is in actual possession; nay more, the bar will exist in a case where the widow continues from the death of her husband to reside for (ten) years upon the premises in which she seeks to be endowed, and then brings her suit for the assignment of dower."—Guthrie v. Owen, *supra.*

For the reasons above stated, and upon the authorities above cited, we decide, that it was not the object of the act of 1843 to bar a suit for the assignment and recovery of dower, and that the present suit is not barred by that act, or by any other statutory provision.

We are aware, that a bar to suits or proceedings for dower, is created by the express words of section 1372 of the Code. But that applies only where the husband died *after the Code went into effect*, and therefore does not touch this case.

It may be conceded, that if the legal title had been barred at law by the statute of limitations, the court of equity, acting upon the analogy of the statute, might well have refused relief. Nimmo v. Stewart, 21 Ala. R. 682. But, as the right here asserted is a *legal* right, and is not barred at law by any such statute, it is evident the court of equity cannot refuse to enforce it upon the analogy of any such statute.

2. It is contended that the doctrine adopted by courts of equity for discountenancing stale claims, justifies the denial of relief in this suit. But, in our judgment, mere lapse of time, short of twenty years, independent of other equitable circumstances, does not authorize the court to treat the complainant's claim as stale, and to deny her relief: and we do not discover anything in the case, which justifies the refusal of relief.—See Campbell v. Murphy, Chapman v. Schroeder, and Ralls v. Hughes, *supra;* Hawley v. Cramer, 4 Cowen, 718.

It is clear from what we have above decided, that the chancellor erred in holding that the complainants are

barred of any relief under their bill by the statute of limitations of 1843, and in dismissing the bill. As we must reverse his decree for the error in that respect, we deem it unnecessary to say anything as to his rulings in relation to the exceptions to interrogatories and evidence; except that his several decisions upon the exceptions, whether erroneous or not, must not be taken as preventing him or this court hereafter from considering the several questions covered by them, as open questions in this cause.

The decree is reversed; and a decree must be here rendered declaring that the complainants are entitled to relief; and remanding the cause, with directions to the chancellor to proceed to make such further decree and orders as may be necessary to ascertain and to secure to complainants the full measure of relief to which they are entitled. The appellee must pay the costs of the appeal.

GOVERNOR, USE, &c., *vs.* PEARCE.

[DEBT ON SHERIFF'S BOND.]

1. *Liability of sheriff and sureties for negligent treatment of runaway slave.*—A recovery cannot be had against a sheriff and his sureties, in an action on his official bond, for the jailor's negligent treatment of a slave, who was apprehended by a justice of the peace, and immediately committed to jail by him as a runaway: the commitment, under such circumstances, is void, because not in compliance with the requisitions of the statute, (Clay's Digest, 541, § 14;) and the fact that the slave was received by the sheriff and jailor as a runaway, does not estop the sureties from setting up the invalidity of the commitment.

APPEAL from the Circuit Court of Tallapoosa.
Tried before the Hon. E. W. PETTUS.

THIS action was brought in the name of Henry W. Collier, for the use of Henry A. Temple, against Stephen A. Pearce, sheriff of Coosa county, and the sureties on his

official bond; and sought a recovery for injuries caused by the jailor's negligence, in the treatment of a slave belonging to said Temple, while in jail as a runaway. On the trial, as the bill of exceptions states, "the plaintiff introduced evidence, tending to show that said slave was his property, and was apprehended by one Thomas C. Dunlap, an acting justice of the peace for said county, on the 16th January, 1853, between the hours of 9 and 10 o'clock, P. M., in the town of Rockford, and immediately taken by him to the county jail in said town, and delivered to the jailor, in the presence of the sheriff, as a runaway; that said Dunlap was known to the jailor as an acting justice of the peace, and declared, when he delivered said slave, that he delivered him as a justice of the peace, and upon his decision, as such justice, that the slave was a runaway, and for the purpose of having him confined as such; that the sheriff and jailor received said slave as a runaway, and kept him as such in one of the cells of the jail until the Tuesday morning following, when he was delivered to Temple's overseer; that the weather was very cold while said slave was so confined in jail; that the slave was only furnished with one blanket and part of another, both much worn, very thin, and of an inferior quality, and, in consequence thereof, was badly frost-bitten in his feet, and thereby much injured, and his value lessened by several hundred dollars. The evidence was conclusive, that said justice made no order in writing for the commitment of the slave. On all the other points in the case, except as to the defendants' bond, the evidence was conflicting."

"On this state of facts, the court charged the jury, that if they believed from the evidence that said slave was arrested by a justice of the peace, on Sunday, the 16th January, 1853, as a runaway, and was carried by him to the jail of said county, and there delivered to the jailor, in the presence of the sheriff, as a runaway; and that the jailor, in the presence of the sheriff, received said slave as a runaway, and confined him as such in the jail; and that the slave was not in fact a runaway; and that said justice of the peace made no order in writing for the commitment

of said slave,—then the plaintiff cannot recover in this action, for any damages sustained by said slave by any neglect or failure to furnish him with blankets. The plaintiff excepted to this charge, and asked the court to instruct the jury, that if they believed from the evidence that said slave was committed to the jail by the justice himself, and delivered by him as a runaway, in the presence of the sheriff, who received the slave as a runaway, and kept him as such until the day when he was delivered to plaintiff's overseer,—then the sheriff was estopped from saying that the slave was not a runaway. The court refused to give this charge, and the plaintiff excepted."

The charge given, and the refusal to charge as requested, are now assigned as error.

L. E. Parsons, John White, and R. M. Cherry, for the appellants.

N. S. Graham, and Jas. E. Belser, *contra*.

WALKER, J.—The charge given, and the refusal to charge, present the following question: Are a sheriff and his sureties liable, in a suit upon his official bond, for an injury to a slave, while in jail, caused by the jailor's negligence, which slave was apprehended by a justice of the peace, and by him carried directly to the jail, and delivered to the sheriff and jailor as a "runaway."

There was no breach of the sheriff's bond, unless the custody and keeping of the negro was an official duty. Such a duty could not have devolved upon the sheriff, unless the slave was committed to jail as a "runaway," by competent authority. It could not be either the right or duty of the sheriff, as an officer, to receive or keep the slave in jail, unless he had been committed, as provided in the statute.

The law, in reference to the apprehension of fugitive slaves, is as follows: "All runaway slaves may be lawfully apprehended by any person, *and carried before the next justice of the peace*, who shall either commit them to the county jail, or send them to the owner, if known; who shall pay

for every slave so taken up the sum of six dollars to the person so apprehending him or her, and also all reasonable costs and charges."—Clay's Digest, 541, § 14. Three distinct acts unite in making the whole proceeding under this statute, which terminates in the imprisonment of the slave: the capture and carrying of the slave before the justice of the peace; the ordering the imprisonment of the slave, and the carrying of the slave to the prison. To make out of the facts here presented a compliance with the statute, we must hold, that the justice of the peace, having apprehended the slave, by a mental process deemed the slave brought before him as a justice of the peace, and then, acting mentally upon facts known to himself as a justice of the peace, adjudged that the slave be committed; and proceeded at once to execute the judgment by carrying the slave to the jail.

We regard the judgment of commitment, if one can be said to have been rendered, as void for want of jurisdiction. The statute contemplates that the captor of the slave shall carry him before the next justice of the peace; and that thereupon the justice shall take jurisdiction, and commit or send the slave to his owner. No importance is attached to the phrase "next" justice of the peace, save as it conduces to show that the slave is to be carried before some other person than the captor. The jurisdictional fact is the carrying of the slave before a justice of the peace as a runaway. That fact did not exist. It is in its nature a distinct fact upon which the authority of the justice depends, and can not be supplied by the intendment of the justice, that he, having apprehended the slave, has carried him before himself as a judicial officer. The power to commit the slave is special and statutory, and can not be exercised in the absence of the preliminary jurisdictional fact. It is true that, when a judicial tribunal is charged with the ascertainment of a jurisdictional fact, and has decided that fact to exist, its decision is conclusive. But in the case put by the charge there was an entire absence of the jurisdictional fact, and no evidence that the existence of that fact was ever passed upon by the justice.

We do not inquire how far the doctrine of estoppel might affect the sheriff, if he were sued alone; but it is clear, that there is no estoppel operating in this suit upon the official bond of the sheriff. Upon that bond no recovery can be had save for official misconduct. "The sureties of a sheriff are not liable for a malfeasance of the sheriff, unless the act complained of includes an omission to perform some duty imposed by law."—Governor v. Hancock & Harris, 2 Ala. 728. That the sheriff represented an act to be official in its character, or that he has assumed to act where he had no authority *virtute officii*, can never estop the sureties from alleging the truth; because they are only bound by his representations and his conduct, when discharging a duty imposed by law. Dean v. Governor, 13 Ala. 526; Fitzpatrick v. Br. Bank, 14 Ala. 533; Farmers' Bank of Chattahoochie v. Reid, 3 Ala. 299; Dumas v. Patterson, 9 Ala. 484.

We are led by the views above expressed to the conclusion, that the receiving and retention of the slave in jail was not an official act of the sheriff—not the discharge of a duty imposed by the law; and, consequently, no suit can be maintained upon the official bond on account of an injury caused by the careless and negligent manner in which the jailor kept the slave.

The judgment of the circuit court is affirmed.

DARGAN *vs.* MAYOR, &c., OF MOBILE.

[ACTION AGAINST MUNICIPAL CORPORATION TO RECOVER DAMAGES FOR LOSS OF SLAVE KILLED BY CITY GUARD.]

1. *Liability of municipal corporation for negligence of officer.*—A municipal corporation, having authority under its charter to pass ordinances forbidding slaves to be abroad at night, or to assemble together without lawful permission, is not liable, at the suit of the owner, for the loss of a slave who was negligently killed by an officer of the city guard, in attempting to arrest him for a breach of such ordinance.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. JOHN E. MOORE.

THE complaint in this case, to which the court below sustained a demurrer, was as follows:

"The plaintiff claims of the mayor, aldermen and common council of the city of Mobile, a corporate body of the State of Alabama, $2,000 damages, for the loss and destruction of a slave named Henry, of the value of $1,500, the property of plaintiff; which said slave was killed and destroyed by the officers, servants, and agents of the defendants, while in the employment of said defendants, and in the performance of the business of said defendants. And said plaintiff says, that by the laws and ordinances of the city of Mobile, duly passed and enacted, it was made lawful for the city guard and watch to seize, arrest, and convey to the guard-house of said city, all slaves found in said city, off the premises of their owners, after the hour of 9 o'clock at night, and being without the written permission of their owners authorizing the same; that after the enactment of said laws and ordinances, and while the same were in force, to-wit, on the night of September 1st, 1856, plaintiff was the lawful owner of said slave Henry, of the value aforesaid, and said slave, on said night, was found by Lewis Galle and others, being of the city guard of said city, and in the employment of said defendants as such, at about 12 o'clock on that night, on the premises of Sidney Smith, within the corporate limits of said city, and off the premises of said plaintiff, and without any written permission or authority from said plantiff or any agent of his to be so absent from plaintiff's premises; that the said slave, being so found by said Galle and others, who were so duly employed by said defendants, and in the service of said defendants as guards, was in fact liable to be seized and arrested by them, for the cause aforesaid, by virtue of said city ordinance, and it became their duty so to arrest said slave; and that said Galle and others, in the discharge of said duty, and in the service of said defendants, did then and there proceed to arrest said slave. But plaintiff further complains, that said guard

did, in making said arrest, so carelessly and negligently conduct themselves, that in seizing, arresting, or attempting to arrest said slave, he was injured and wounded, and of said injuries and wounds he died, and was wholly lost to plaintiff; and plaintiff avers, that said killing and loss was from the gross carelessness and negligence of said guard, so in the employment of said defendants, and wholly without any good reason or excuse for said killing. By reason whereof plaintiff has sustained damage," &c.

"And plaintiff claims of said defendants the further sum of $2,000, for the loss and destruction of a slave named Henry, the property of plaintiff, of the value of $1500; which said slave was killed and destroyed by the officers, servants, and agents of said defendants, whilst in the employment of the defendants, and in the performance of a duty required of such officers, agents and servants to be performed. And plaintiff says, that by a law and ordinance, duly passed and enacted by said defendants, it was made unlawful for any four or more slaves to assemble or collect together, at any place in the city of Mobile, either in the day or night, for any purpose whatever, without the permission of the mayor or one of the aldermen of said city, except on the premises of their owner or employer; and that if any four or more slaves should be found so assembled in said city, either in the day or night, except as aforesaid, it should be the duty of any officer of the police, and any one of the city watch, to arrest said slaves, and carry them before the mayor or any one of the aldermen of said city, who shall cause said slaves to receive any number of stripes, not less than twenty. And plaintiff avers, that whilst said ordinance was in full force, to-wit, on the 1st September, 1856, at night, and about 12 o'clock at night, and whilst plaintiff was still the owner of said slave, the said slave, without authority or permission from any person whatever, together with three other slaves, also without authority or permission from any one, assembled in the city of Mobile, at the residence of Sidney Smith, (none of said slaves being the property of said Smith, nor in the employment of said Smith;) and that said Galle and others of the city watch proceeded to arrest

the said slaves, so assembled together, as it was their duty to do under the ordinance aforesaid; but, in making said arrest, said Galle and others of the city watch conducted themselves so carelessly and negligently that they killed and destroyed said slave Henry, without any reason or cause for said killing; and by reason of the killing and destroying of said slave, as aforesaid, plaintiff has sustained damage," &c.

The sustaining of the demurrer to the complaint is now assigned as error.

E. S. DARGAN, *pro se*.—That an action on the case lies against a municipal corporation, for a tort done by its agents or officers, is too well settled to be controverted. 19 Pick. 511. Such a corporation, therefore, is not a sovereign exempt from suits, but is liable to be sued for the acts of its agents.—3 Comstock, 463; 19 Pick. 511; 5 La. Ann. R. 100; 15 Ohio, 474; 1 Selden, 369; 3 Hill, 531; 2 Denio, 433. When such a corporation acts in a legislative or judicial capacity, over subjects-matter within its jurisdiction, it is not responsible; as in laying off new streets, declaring nuisances, and abating them. In doing such acts through its agents, it is not responsible, if the act be done with a proper degree of care and diligence. So it may order to be done any other act necessary to the good government or police of the city, within the range of the powers conferred by its charter. But a corporation can only act through its agents, and, in doing a lawful act, must observe the same care and prudence that are required of an individual; and if the act is done in a careless and negligent manner, the corporation must be liable, on the principle of *respondeat superior*.—3 Comstock, 463; 3 Hill, 531; 15 Ohio, 474; 5 La. Ann. R. 100; 2 Denio, 433.

A municipal corporation acts as a sovereign, only when it executes the sovereign will of the State, as expressed by the legislature; not when it merely executes, in a ministerial manner, its own ordinances, passed of its own will, for this would exempt it from all demands growing

out of the negligent conduct of its officers. This is the true test—a distinction which reconciles all the cases.

DANIEL CHANDLER, *contra.*—The defendants had power, under their charter, to pass the ordinances set out in the complaint; and acted, in adopting those ordinances, in their public, or sovereign capacity. They were compelled to employ the services of others in carrying those ordinances into effect. No neglect of duty on their part, in the selection of their officers, is alleged. In the performance of their duties, a discretion was necessarily reposed in those officers. The acts to be performed by them concerned only the public interests. Under these circumstances, the officers themselves may be liable for the consequences of their neglect or misconduct, but the corporation certainly is not.—Story on Agency, §§ 319–22; 1 Hill, 550; 3 Hill, 538; 15 Barbour, 441; 2 Bing. 156; 4 M. & S. 27; 2 Denio, 450; 12 Missouri, 414; 2 Barbour, 108; 3 Watts & Serg. 105.

WALKER, J.—The corporation of the city of Mobile had authority to pass ordinances providing for the arrest and punishment of slaves abroad in the city, after nine o'clock at night, without written permission; or assembling in numbers of four or more, off the owner's premises, without the permission of the mayor or one of the aldermen.—See the charter of the city, in Pamphlet Acts of 1843–44, p. 180, § 15. This power was purely political in its character, and exclusively for the benefit of the public. As to that power, the corporation was a government, *imperium in imperio.* The employment of the officer for whose negligence in the discharge of his duty the corporation is sued, was the necessary, proper and authorized means for the execution of that power; and the action of the officer, from its nature, was not susceptible of supervision by the corporation.—See 37th section of charter. In the legislative adoption of the ordinances described in the pleading, and in the appointment of the officer, the corporation exercised a lawful authority. It is not alleged

that the corporation was guilty of any negligence or misconduct in the selection of the officer.

The question here is not as to the liability of a corporation for the omission to discharge its duty; nor for the performance of an unlawful act by it or its authority; nor for the exercise of a power not delegated; nor for the negligence of its agents, or officers, in the performance of an act for the private benefit of the corporation, or done under the immediate supervision of the corporation. The question of this case is, whether a municipal or public corporation is liable in damages, for an injury resulting from the careless or negligent official conduct of one of its officers, in whose selection there was no negligence, and whose employment was the lawful and necessary means of executing a governmental power vested in it for the public benefit, and whose acts are not done under the supervision of the corporation. This question we decide in the negative.

Because the corporation is, as to the passage of the ordinances and the appointment of the officer described in the pleadings, a government, exercising political power, it is irresponsible for the official misconduct alleged, upon the same principle which generally protects governments and public officers from liability for the misfeasances and malfeasances of persons necessarily employed under them in the public service.—Story on Agency, §§ 319, 319 *a*, 319 *b*, 320, 321; Dunlap's Paley's Agency, 376. Municipal corporations, *quoad hoc*, stand upon the same foundation with public officers, counties, townships, and other *quasi* corporations, charged with some public duty, or invested with some portion of the authority of the government, where the employment of officers is necessary and lawful.

The only one of the authorities cited by the appellant, which possibly sustains his position, is Johnson v. Municipality No. 1, 5 La. 100. In the case of Thayer v. The City of Boston, 19 Pick. 511, the corporation was held to be liable for an injury produced by the unlawful act, done under its authority, of obstructing the public highway. It was decided in the Rochester White Lead Co. v. City

of Rochester, 3 Comstock, 463, that a city corporation was responsible for injury resulting from the unskillful and careless manner in which a sewer was constructed. That case draws the distinction between judicial and ministerial duties; recognizes the adoption of the ordinance for the construction of the sewer as a judicial, and its actual construction as a ministerial duty; and holds the corporation responsible for the discharge of the latter. The duty of constructing the sewer was discharged by the corporation itself, through its employees; the work was under the supervision and control of the corporation; and the law devolved upon it an obligation to complete the work with reasonable skill and care. In those particulars, that case differs from this. The ministerial duty of executing the ordinances described in the declaration was one which, from its very nature, had to be discharged by officers performing each particular act free from the control and supervision of the corporation. The arrest of slaves violating those ordinances is an act of nature kindred to the arrest of criminals by the sheriff or marshal. The postmaster-general is not responsible for the official misconduct of his deputies, because their duties are of a public nature, and for public purposes, and a supervision of their acts is impracticable.—Story on Agency, § 318. Mnnicipal corporations must have the benefit of the same principle, for it is as applicable to them as to any officer of the government.

In the case of Lloy v. The Mayor and Aldermen of New York, 1 Selden, 369, the liability of the corporation, for an injury resulting from the negligence of persons employed in the repair of a sewer, was placed upon the ground, that the duty of repairing sewers was private, and the corporation was responsible for the negligence of its agents in the discharge of its private, but not of its public duties. We are not sure that the duty of the corporation in that case was appropriately classed as private, or that the decision itself was correct in departing from the principle of the Rochester White Lead Co. v. City of Rochester, *supra*. But, if the doctrine of that case were applied to this, it would be fatal to the action; for the duty of

arresting slaves, under the ordinances of the corporation, was clearly and exclusively public, and for the benefit of the public.

The supreme court of New York did not go so far in the case of Bailey v. Mayor of New York, 3 Hill, 531, as it did in the subsequent cases which we have noticed above. In that case, the liability of the corporation, for the misconduct of its agents and officers, is limited to that class of cases where they are employed about its private interests; as, for instance, in the improvement of its private property. The principle there laid down would exempt from responsibility for injuries resulting from the negligence of the employees of the corporation in works upon the public streets and *sewers*. The same case was before the court of errors; and there Chancellor Walworth held, that the city of New York was liable for an injury done by the washing away of the dam across the Croton river, upon the ground that the land upon which the dam was situated belonged to the corporation, and it was the duty of the proprietor of the land to see that it was so used as not to become noxious to the occupiers of property below.—2 Denio, 433.

In Pack v. Mayor, &c., of New York, 4 Selden, 222, it was decided, that a city corporation was not liable for injuries occasioned by the workmen of a contractor with the corporation for grading the street.

In Delmonico v. Mayor, &c., of New York, 1 Sandf. S. C. R. 222, it was decided, without a discussion of the principle involved, that the city was responsible "for the negligence, unskillfulness or malfeasance of its agents and contractors, engaged in the construction of its public works."—See, also, Mayor of New York v. Furze, 3 Hill, 612. That case is distinguishable from this, in the same particulars with the case of the Rochester White Lead Co. v. City of Rochester, *supra*.

In North Carolina, municipal corporations are held to be liable for damages accruing from the unskillful and incautious manner in which a public street was graded. Mears v. Commissioners of Wilmington, 9 Iredell, 73. In a very able opinion, it is argued, that the improvement

of the streets by grading is really for the private benefit of the corporators, although the public derive an incidental benefit. There is nothing, however, in that opinion, which sanctions the proposition, that the arrest of slaves, abroad at unreasonable hours, or congregating in dangerous numbers, is an act for the private benefit of the corporation. It contains nothing in conflict with the idea, that the authority to do such an act is, like the administration of the criminal law, in promotion of the public safety and morals, and, therefore, public in its nature, although the particular community may be specially benefited.

The case of McComb v. Town Council of Akron, 15 Ohio, 474, does not touch the principle of this case. It goes to the extent of making a corporation responsible for an injury by the lawful and authorized grading of the street to an adjoining proprietor, but does not touch the question of liability for the negligence of an officer, necessarily employed beyond the supervision of the corporation, in the arrest of violators of its ordinances. The decision in the City of St. Louis v. Gurno, 12 Missouri, 414, does not touch the question here, but is in conflict with the decision of the Ohio court.

The case of Johnson v. Municipality No. 1, 5 La. Ann. R. 100, is the case which we conceded in the outset of this review of authorities might sustain the position of the appellant. In that case, the municipality was subjected to the payment of damages caused by the neglect of the keeper of the police jail to advertise the imprisonment of a runaway slave. It is possible that that case may be distinguished in the susceptibility of the jailor's conduct of supervision. But it is unnecessary that we should pause to make such a distinction. The same court, in the subsequent case of Stewart v. City of New Orleans, 9 La. Ann. R. 461, held, that the corporation was not liable for the negligence of the watch in the arrest of a slave, whereby the slave was killed. That case was strikingly similar to this, and involved the same principle. It asserts the doctrine, that municipal corporations enjoy the exemption of government from responsibility for its own acts

and the acts of its officers, deriving their authority from the sovereign power, whenever it exercises powers which it possesses for public purposes, and which it holds as a part of the government of the country.

The following language is used by Mr. Justice Cowen, in the case of Martin v. Mayor of Brooklyn, 1 Hill, 545: "It (a municipal corporation) is a political body, bound, I admit, and liable to an action, when incurring a debt through its corporate officers, acting within the line of their duty; but not for either misfeasance or nonfeasance *committed by independent corporate officers.*"—Fox v. Northern Liberties, 3 W. & S. 103.

Our review of the authorities shows, that there is no great uniformity of decision as to the principle which governs the liability of municipal corporations for the misfeasances and malfeasances of their agents. None of them, however, are in conflict with the doctrine laid down by us, as controlling the decision of this case, unless we so regard the case from 5th La. Ann. R., from which all weight as an adverse authority is taken away by the subsequent decision of the same court. Having decided this case without involving the points of contest among the decisions, it is not incumbent upon us to attempt to harmonize them, or to pass our judgment upon any of them as expositions of the law. We have stated and decided the question of the liability of the appellee upon the circumstances of the case. We do not inquire, and do not mean to decide, whether the concurrence of all the circumstances from which the exemption from liability in this case is deduced, is indispensable to the conclusion we have attained. We decide this case upon grounds which we conceive perfectly safe and sound, and we leave any future case which may not be identical with it to be met when it may arise.

The judgment of the court below is affirmed.

CORNELIUS *vs.* CORNELIUS.

[BILL IN EQUITY FOR DIVORCE ON GROUND OF CRUELTY.]

1. *Jurisdiction of chancellor over custody of children.*—Under the act of 1833, (Clay's Digest, 171, § 20,) the chancery court has jurisdiction, whenever an ineffectual attempt to obtain a disvorce is made by either husband or wife, to make an order giving the custody of the children to either party, as the circumstances of the case may require.
2. *Admissions of husband competent evidence.*—Although the admissions of the husband cannot be made the foundation of a decree of divorce in favor of the wife; yet they are competent evidence against him on the question of the custody of the children.
3. *Custody of child confided to mother.*—Where the wife fails in her application for a divorce, but the proof establishes the fact that the husband is an habitual drunkard, requiring the control of friends to prevent the commission of violence by him when intoxicated, the court will decree to the wife the custody and education of their only child, (a son, three years old when the decree was rendered;) but the order, in such case, should be temporary merely, and subject to future modification, as may be required by the welfare of the child, and justified by the subsequent conduct of the parties.
4. *Dismissal of bill generally, and without prejudice.*—When the complainant fails to establish her case by proof, the bill should be dismissed generally, and not without prejudice, unless some special circumstances are shown.
5. *Costs.*—The chancellor's decree, dismissing the wife's bill for a divorce without prejudice, but decreeing to her the custody of her only child, having been modified on error, at the instance of the husband, so far as to dismiss the bill generally, the costs of the appeal were adjudged against the next friend of the wife, and the costs of the court below against the husband.

APPEAL from the Chancery Court of Madison.
Heard before the Hon. A. J. WALKER.

THE bill in this case was filed, in August, 1852, by Mrs. Emily Cornelius, suing by her next friend, against her husband, William Cornelius; and sought a divorce *a vinculo matrimonii*, on the ground of the defendant's cruelty, resulting from his habitual intoxication; also, a division of the husband's property, and that the custody and education of the only child of the marriage, who was about three months old when the bill was filed, might be committed to the complainant. The defendant answered

the bill; admitting that he was addicted to the occasional use of intoxicating drinks, but denying that he was an habitual drunkard; alleging that complainant was fully apprised of this fault before she married him, and that the marriage was solemnised when he was in one of his worst paroxysms of intoxication; and denying all the charges of cruelty and unfitness for discharging his duties towards his infant son. On final hearing, on pleadings and proof, the chancellor dismissed the bill, but without prejudice, so far as it sought a divorce; but made an order, committing to the complainant the care and custody of the child, who was about three years old when the decree was rendered, perpetually enjoining the defendant from disturbing or interfering with the complainant's control of the child, and taxing the costs against the defendant. From this decree the defendant appeals, and assigns each part of it as error.

ROBINSON & JONES, for the appellant.

No counsel appeared for the appellee.

STONE, J.—The act, entitled an act "to educate children in certain cases," approved January 1st, 1833, declares, "that the courts of chancery in this State shall have power, in all cases of separation between man and wife, and neither party shall obtain a divorce, to give the custody and education of the children to either the father or mother, as to them may seem right and proper; having regard to the prudence and ability of the parents, and the age and sex of the child or children."—Pamph. Acts, 1832–3, p. 18; Clay's Digest, 171, § 20.

In Hansford v. Hansford, 10 Ala. 561, this court, speaking of the statute above copied, said, it "seems to contemplate the action of the chancellor where there is an ineffectual attempt to procure a divorce." Under this construction, which we cordially approve, there can be no question of the chancellor's jurisdiction, under the bill filed in this case, to make the order from which this appeal was prosecuted.

Various exceptions were filed to the testimony, which

the chancellor did not pass upon. We do not consider it necessary to pronounce an opinion on those exceptions, because the testimony thus excepted to does not change the result.

We agree with the chancellor in the conclusion, that the custody and education of the child of complainant and defendant should, for the present, be committed to the mother. She is shown by the proof to be a lady of excellent and exemplary character; while the testimony conclusively establishes the fact, that fixed intemperate habits have obtained the mastery of her husband. He admits this in his answer; and, while admissions cannot be the foundation of a divorce, they are competent evidence on the question of the custody of the child. Aside, however, from the admissions found in the answer, the testimony on this point is full.

We do not wish to be understood as laying down as a rule, that intemperance in the father will justify a court of chancery in depriving him of the society of his children. The testimony in this case goes much beyond this. It shows that Mr. Cornelius, in his frequent fits of intoxication, becomes a boisterous, raving madman; that these fits last for days, and when under their influence, the care and control of friends have to be called into requisition. A boisterous man, maddened and demented at frequent and short intervals by intoxicating drinks, who requires at such times the watchful care of friends, is certainly not a suitable guardian for either the person or moral training of a child of tender years. Moreover, it is known to all, that habits of this kind become usually more inveterate with increasing years. The welfare of the offspring is the controlling consideration, in applications such as this. We think we promote that welfare by placing the child in the custody of the mother.—See a full description of this subject in Bishop on Marriage and Divorce, chap. 31, book VI, §§ 632 to 645.

It being thus shown that orders of this kind are made for the benefit of the child, it follows, that what may benefit him to-day, may be injurious to him at some future time. Permanent fitness or unfitness for the control of

children, dependent on such a cause as this, cannot be predicated of any human being. This child is taken from his father and natural guardian, not on account of any fixed, incurable moral obliquity of character, but because of his unfitness, growing out of intemperate habits. Those habits may change, and he may again become, as he evidently has been, a good and valuable citizen, every way qualified to "train up his child in the way he should go." Should he so reform, and give satisfactory evidence that such reformation is permanent, there certainly should be no insurmountable barrier to his recovery of his child. That a temporary order may be made, subject to future modifications, as circumstances may render the same proper, is fully shown by the following authorities: Codd v. Codd, 2 Johns. Ch. 141; Barren v. Barren, 4 *ib.* 187; Bishop on Marriage and Divorce, § 634.

There would be much difficulty in laying down an absolute rule, fixing a period when the custody of a male child should be taken from the mother and given to the father. If all parents were alike suitable, possibly we might do so. As we before remarked, a father or mother who is every way qualified for the trust at one time, may be wholly unfit at another. Where there is no unfitness in the mother, evidently the child should remain with her, until he has reached an age when he can dispense with those tender offices which only a mother can bestow. At what particular age that period will arrive, we will not undertake at this time to determine. On the other hand, if one parent be a suitable custodian of the child, and the other not, and this suitableness of the one and unfitness of the other continue, the child should be put under the care of the one who is suitable, and no change should be afterwards made. This permanent unfitness cannot, however, be known in this case.

The chancellor erred in making the injunction perpetual. It should have been only until the further order of the court. After the child attains a suitable age to be removed from his mother, if Mr. Cornelius give satisfactory evidence of reformation, the chancellor, on his petition, will make the proper order in the premises. This

order might be made sooner, if Mrs. Cornelius should become less suitable to have the care of the child than Mr. Cornelius.

It is objected that the chancellor erred in dismissing, without prejudice, those features of the complainant's bill which prayed for divorce and alimony. We think there are no circumstances disclosed by this record, which rendered this order proper; and having modified the decree in other respects, we will here make an order that the bill, so far as it prays divorce and alimony, be dismissed generally.—Rumbly v. Stainton, 24 Ala. 712, 719.

The decree of the chancellor is reversed; and this court, proceeding to render such decree as the chancellor should have rendered, does hereby order, adjudge and decree, that the said William Cornelius be, and he hereby is, enjoined from removing the said child from the care and custody of the said Emily Cornelius, until the further order of the chancellor in the premises. Let the complainant's bill, so far as it seeks divorce and alimony, be dismissed out of court. Let the costs of the court below be paid by the said William Cornelius, and the costs of this appeal by the complainant's next friend.—See Mosser v. Mosser, 29 Ala. 318; Gray v. Gray, 15 Ala. 779.

DUNHAM *vs.* HATCHER.

[FINAL SETTLEMENT OF GUARDIANSHIP AND ADMINISTRATION.]

1. *Appointment of testamentary guardian.*—The appointment by the probate court of an administrator *de bonis non, cum testamento annexo*, confers no authority on the person appointed to act as testamentary guardian of the decedent's infant children; nor has the probate court jurisdiction to settle his accounts as such guardian.
2. *Parties to appeal, and description of decree.*—On final settlement of the accounts of two administrators *de bonis non, cum testamento annexo*, who had also acted as testamentary guardians of the decedent's infant children, but without authority, two separate decrees were rendered; one against the

administrators as such, and the other against them as guardians. The guardian *ad litem* of the infants reserved exceptions to several rulings of the court, in the matters of account relating both to the administration and to the guardianship, which were embodied in one bill of exceptions. The infants sued out an appeal, by their guardian *ad litem*, and assigned as error the rulings of the court to which exceptions were reserved. On motion to dismiss the appeal, on account of the improper consolidation of the two decrees, *held*, that the appeal brought up only the decree in the matter of the guardianship, because the decedent's widow, who was a party to the other decree, was not made a party to the appeal; and the motion was overruled.

3. *Bill of exceptions necessary.*—An appeal from a decree of the probate court, in the matter of the final settlement of a guardian's account, (Code, §§ 1891, 2039,) is required to be tried on bill of exceptions; consequently, the appellate court cannot consider any questions not presented by the bill of exceptions, except a want of jurisdiction.

4. *Decree reversed, but not remanded.*—In reversing a decree of the probate court, in the matter of the final settlement of a guardian's accounts, on account of a want of jurisdiction apparent on the record, the cause will not be remanded, unless it is suggested that the want of jurisdiction can be obviated in the event the cause is remanded.

APPEAL from the Probate Court of Dallas.

THE record in this case shows these facts: Robert S. Hatcher and John A. Lodor were appointed by said court (at what time does not appear) administrators *de bonis non, cum testamento annexo*, of William P. Dunham, deceased; and, by virtue of said appointment, undertook to act as testamentary guardians of Texana Dunham and Willie P. Dunham, infant children of said decedent, but without giving bond as guardians. Said Hatcher and Lodor made several partial settlements with said probate court, both as administrators, and as guardians; and at the January term, 1857, made a final settlement of their administration and guardianship, which seem to have been (at least partially) consolidated. On this settlement, F. M. Blackwell, who had married the decedent's widow, and who had been appointed guardian *ad litem* of said infant children, reserved exceptions to several rulings of the court, in the allowance of credits and commissions to said Hatcher and Lodor, both as administrators, and as guardians; all of which are embraced in one bill of exceptions. Two separate decrees were rendered against said Hatcher and Lodor; one in their character as guardians, which recites

that they have paid into court the amount found due from them as guardians, accepts their resignation, and declares the guardianship fully closed and settled; and the other in their character as administrators, reciting that they have paid over to said F. M. Blackwell, "one third for his wife, Mrs. Sarah Dunham, and two thirds for his wards, Texana and Willie P. Dunham," the amount found due from them as such administrators; accepting their resignation as administrators, and declaring the estate finally settled and closed.

The appeal is sued out by Texana and Willie P. Dunham, by their guardian *ad litem*, who assign as error "the matters set forth in the bill of exceptions."

In the acknowledgment of the sureties for costs, the case is entitled thus: "Texana and Willie P. Dunham, infants, heirs and distributees of William P. Dunham, deceased, by F. M. Blackwell, their guardian *ad litem*, v. John A. Lodor and Robert S. Hatcher, administrators of William P. Dunham, and testamentary guardians of Texana and W. P. Dunham." In the citation to the appellees, the appeal is described as being taken from "a decree rendered at the January term, 1857, of said probate court, in a cause between Texana and Willie P. Dunham, infants, heirs and distributees of W. P. Dunham, by F. M. Blackwell, their guardian *ad litem*, and John A. Lodor and Robert S. Hatcher, administrators *de bonis non* of W. P. Dunham, and testamentary guardians of Texana and Willie P. Dunham." In the final certificate appended to the transcript, the probate judge certifies, "that the foregoing pages," &c., "contain a full and complete transcript of the decrees made by said court, at its January term, 1857, on the final settlement of the administration of John A. Lodor and Robert S. Hatcher, (administrators *de bonis non*, with the will annexed,) on the estate of William P. Dunham, and on the final settlement by said Lodor and Hatcher of their accounts as testamentary guardians, under the will of said W. P. Dunham, deceased, of Texana and Willie P. Dunham; also, of the will of said W. P. Dunham, deceased; of the bill of exceptions granted by said court, on said final settlements, to F. M.

Blackwell, guardian *ad litem* of said Texana and Willie P. Dunham; of the bond given by said Blackwell, for the costs of appeal from the judgment of said court; and of the citation issued to said Lodor and Hatcher.". On these facts a motion to dismiss the appeal was predicated, because it sought to consolidate two distinct decrees.

PEGUES & DAWSON, for the appellants.
GEO. W. GAYLE, *contra.*

RICE, C. J.—From the bill of exceptions, as well as from other parts of the record, it appears that Robert L. Hatcher and John A. Lodor regarded themselves as the testamentary guardians of Texana Dunham and Willie P. Dunham, simply because they were the administrators *de bonis non, cum testamento annexo*, of William P. Dunham, deceased; and that for the same reason, and no other, the probate court of Dallas county treated the said Hatcher and Lodor as such guardians. The bill of exceptions clearly shows, that said Hatcher and Lodor never gave bond as such guardians, but acted in that capacity "*merely by their appointment as administrators of said William P. Dunham.*"

The mere appointment of two persons as administrators *de bonis non, cum testamento annexo*, of a deceased father, cannot in any case, in this State, authorize them to act as testamentary guardians of his minor children, nor give to the probate court making such appointment jurisdiction, by final decree or otherwise, to treat them as testamentary guardians, or to settle their accounts as such guardians. That court is one of special and limited jurisdiction, as to the settlement of the accounts of persons acting as guardians. In other words, it has no jurisdiction to settle the accounts of guardians appointed by some other probate court, nor of persons whose pretensions or claims to the character or capacity of guardians for certain minor children, rest upon *the sole* ground that they have been appointed administrators *de bonis non, cum testamento annexo*, of the deceased father of those children. As the probate court is, in this respect, a court of special and limited

jurisdiction, consent cannot give it jurisdiction, where the record not only fails to show every thing necessary to confer jurisdiction, but actually shows the non-existence of one or more of the jurisdictional facts. Upon the case as presented by the bill of exceptions now before us, we decide, that Hatcher and Lodor were not the testamentary guardians of Texana and Willie P. Dunham; that the probate court of Dallas county had no jurisdiction to settle their accounts as such guardians; and that the decree of that court, which purports to fully close and finally settle their guardianship and accounts as guardians, is void, and must be reversed.—Taliaferro v. Bassett, 3 Ala. R. 670; Clay's Digest, 221, § 3; *ib.* 269, §§ 10–13; Code, §§ 2015, 2018; Eslava v. Lepetre, 21 Ala. R. 504.

2. We are urged to revise the action of the probate court of Dallas, upon the final settlement of the accounts of said Hatcher and Lodor as administrators *de bonis non* of William P. Dunham. We cannot do that; because the appeal is not taken from the decree which settles their accounts in their capacity or character of administrators merely, but from the decree which purports to settle their accounts in their character of guardians. One appeal could not bring up both decrees for revision. The parties to those decrees are not the same, in this, that Mrs. Sarah Dunham, now the wife of F. M. Blackwell, is interested in the decree as to the mere administration, but not in the decree as to the guardianship.—Shearer v. Boyd, 10 Ala. R. 279; Boyett v. Kerr, 7 *ib.* 9.

It is upon the ground that the appeal is from the decree as to the guardianship only, that we overrule the motion to dismiss it. Under our former decisions, we deem it clear that the appeal is from that decree, and well taken.—Williams v. McConico, 27 Ala. R. 572; Satterwhite v. The State, 28 Ala. R. 65.

3. We have avoided the consideration of the will of William P. Dunham, for two reasons: 1st, because we are compelled to reverse the decree appealed from, for want of jurisdiction of the probate court to render it; 2d, because, if we had not reversed for this want of jurisdiction, the will was not made part of *the bill of exceptions*, and

therefore could not have been considered by us, inasmuch as the Code requires us to try such cases (when the probate court has jurisdiction to render the decree appealed from) on the bill of exceptions.—Code, §§ 1891, 2039; Turner and Wife v. Dawson, at last term.

Whether the will does not create or declare trusts which are not within the jurisdiction of the probate court, we cannot properly decide upon the present record.—See Billingsley v. Harris, 17 Ala. R. 214, and cases there cited; Gerald v. Bunkley, *ib.* 170; Wilson v. Knight, 18 *ib.* 129; Weems v. Bryan, 21 *ib.* 302.

The decree appealed from is reversed, and annulled for want of jurisdiction in the probate court to render it. And unless it is suggested by the appellees or their counsel, that the objection for want of jurisdiction, which we have above sustained, can probably be obviated in the event the cause is remanded, the cause will not be remanded. If that suggestion is made, the cause will be remanded.

The appellees must pay the costs of this court.

LEONARD *vs.* STORRS.

[ACTION ON PROMISSORY NOTE BY RECEIVER IN CHANCERY.]

1. *Error without injury in rulings on pleadings.*—Where the plaintiff's right of action is founded on a decree in chancery, which is an uncontroverted fact in the case, and that decree confers on him the right to maintain the action, the appellate court will not, at the instance of the defendant, examine into the correctness of the rulings of the primary court on the special pleadings in the case, since those rulings, even if erroneous, can work no injury to the defendant.
2. *Who is proper party plaintiff.*—A receiver in chancery, having been ordered by the chancellor to collect the notes and debts due to a partnership, which the parties themselves were enjoined from collecting, may (Code, § 2129) maintain an action on such notes in his own name.

APPEAL from the Circuit Court of Franklin.

Tried before the Hon. ANDREW B. MOORE.

THIS action was brought by John L. Storrs, against James L. R. Leonard; and was founded on a promissory note for $867, made by the defendant and one Daniel Courtney, dated Montevallo, January 16th, 1854, and payable four months after date, to the order of J. C. Riddle. The pleadings were drawn out at great length, presenting substantially the same question in different forms; but the decision of the court renders it unnecessary to state them in detail, or to notice the rulings of the court upon them. The plaintiff proved, that the note sued on belonged to the firm of W. D. Riddle & Co., and had been given in payment for property bought from the firm; and, to show his right to maintain the suit in his own name, read in evidence a transcript from the records of the chancery court at Talladega, showing the proceedings had in a cause therein pending, wherein one David H. Carter was plaintiff, and John C. Riddle, the defendant in this suit, and others were defendants. This transcript showed, that, by an interlocutory decree rendered on the 26th July, 1854, Leonard was enjoined from paying over to John C. Riddle, until the further order of the court, any moneys which he then owed to the firm of W. D. Riddle & Co.; that by an order made on the 21st September, 1854, said Storrs was appointed receiver in said cause, and was authorized to collect the debts due to the said partnership. The material portion of this order was in these words: "It is further ordered, adjudged, and decreed, that said receiver shall collect and get in the debts due, or which may become due, to said partnership; that he may bring actions for the recovery of such debts, as occasion may require, and, to that end, may use the names of any or all of the following parties to this suit—John C. Riddle, David H. Carter, and Andrew W. Bowie, administrator of the estate of W. D. Riddle, deceased; and the person or persons, in whose names such suits may be brought, shall be indemnified against any costs or damages on account thereof, out of the assets of said partnership." Another decretal order in said cause, made on the 3d March, 1855, was as follows: "It is further ordered, adjudged, and decreed, that the receiver shall forthwith

proceed to collect the note on J. L. R. Leonard and D. Courtney, dated 16th January, 1854, and due at four months, for $867, and is authorized to institute suit upon the same." The rulings of the circuit court on this state of facts, both on the pleadings, and in the instructions to the jury, were in favor of the plaintiff's right of recovery; to which the defendant excepted, and which he now assigns as error.

J. B. Moore, and J. R. John, for the appellant, contended, that the order of the chancellor did not authorize the receiver to sue in his own name, independently of statutory provisions, and did not make him the "party really interested," within the meaning of section 2129 of the Code; citing the following authorities: Pitt v. Snowden, 3 Atk. 750; Merriott v. Lyon, 16 Wendell, 410; 3 Dan. Ch. Pr. 1991; Freeman v. Winchester, 10 Sm. & Mar. 580; 3 Mete. 581; 23 Pick. 489; 2 Paige, 452.

William Cooper, *contra*, cited and relied on Mansony & Hurtell v. U. S. Bank, 4 Ala. 735; Franklin v. Osgood, 14 Johns. 553; Mauran v. Lamb, 7 Cowen, 174.

STONE, J.—This record presents really but one question—namely, the right of the receiver to maintain this suit in his own name. If he have not that right, the record abounds in errors, which will be fatal to the action on any future trial. On the other hand, if he have the right, it is not important that we should inquire into the correctness of the several rulings to which exception was taken on the trial below. The nature of the plaintiff's claim or interest in the note in suit, and the order of the chancellor which created that claim or interest, are among the uncontroverted facts of this record; hence, if the right existed to sue in his name, any errors into which the circuit judge may have fallen, if such there be, fall within the class of errors without injury. For such errors we do not reverse.—Dunlap v. Robinson, 28 Ala. 100, and authorities cited; Powell v. Powell, 30 Ala. 697.

It may be true that, without any statute on the subject,

a chancellor may appoint a receiver for the rents of real estate, order the tenant to attorn to such receiver, and then clothe the receiver with the power of maintaining an action for the rents in his own name.—3 Dan. Ch. Pr. 1977; Mansony & Hurtell v. Bank of United States, 4 Ala. 735, 752. This rests on the power of the court to create a privity, by compelling the tenant to attorn to the receiver. When, however, *in the absence of a statute*, it is proposed to vest in a receiver the right to collect, *in his own name*, a promissory note, the legal title to which is in another, this presents a very different question. Whether such result could be accomplished, we need not decide. It is evident such power would not be conferred by an order appointing a receiver, and authorizing him to collect the note.—See authorities on the brief.

Let us consider the question as modified by the Code. Under the interlocutory order of the chancellor, made in reference to the effects of the late partnership of W. D. Riddle & Co., each of the partners was enjoined from collecting the note which is the foundation of this suit; and Leonard, the maker, was enjoined from paying it to them, or either of them. Mr. Storrs was appointed receiver, and was ordered by the chancellor to collect this note. Under this state of the case, Mr. Storrs had the sole and exclusive right to receive the money due on this note. We hold, that he was the party *really interested*, within the meaning of section 2129 of the Code, and that the action was properly brought in his name. We confine our decision to the case made by the record, and do not undertake to lay down any rule for the government of cases unlike the present.—See Franklin v. Osgood, 14 Johns. 527, 553.

The judgment of the circuit court is affirmed.

SMITH *vs.* GARRETT.

[ACTION ON NOTE GIVEN FOR PURCHASE-MONEY OF SLAVE.]

1. *Construction of bill of exceptions.*—A bill of exceptions, although construed most strongly against the party excepting, must nevertheless receive a reasonable construction.
2. *Costs on successful plea of set-off.*—In an action on a note given for the unpaid balance of the purchase-money of a slave, the defendant pleaded the general issue, "with leave to give in evidence any matter of defense;" insisted, in defense, on fraud in the sale, and a breach of the warranty of soundness of the slave; and claimed damages, by way of set-off, on account of the fraud and breach of warranty, for an amount greater than the balance due on the note. The jury having found a general verdict for the plaintiff, for the amount of the note and interest, less $117,—*held*, that the defendant was not entitled to a judgment for costs, (Code, § 2378,) as when the plea of set-off is successfully interposed.

APPEAL from the Circuit Court of Lowndes.
Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by Robert B. Smith, against William J. Garrett and Daniel T. McCall; and was founded on the defendants' promissory note for $420, given for the unpaid balance of the purchase-money of a slave sold to them by plaintiff. The action of the court in taxing the plaintiff with the costs of the attendance of witnesses, when he recovered a verdict and judgment for the amount of the note and interest, less $117, is the only matter assigned as error; and the facts on which this action of the court was founded, as stated in the bill of exceptions, being substantially stated in the opinion of the court, need not be here repeated.

WATTS, JUDGE & JACKSON, for the appellant.
D. W. BAINE, *contra*.

RICE, C. J.—Section 2375 of the Code provides, that "the successful party, in all civil actions, is entitled to full costs, for which judgment must be rendered, unless in cases otherwise directed by law." The action here was a civil action. The plaintiff was "the successful

party" in it, and is, under that section, "entitled to full costs," unless the record shows the case to belong to a class in which the law otherwise directs. The case is not one of that class, unless it be the specific case, in substance or letter, provided for by section 2378 of the Code, which declares, that "in all actions where a set-off is *pleaded and controverted*, the defendant recovers his costs *sustained in establishing the set-off*, though judgment be rendered for the plaintiff for a residue."

The bill of exceptions taken in the case must be construed most strongly against the party excepting; but still it must receive a reasonable construction.—Goodgame v. Clifton, 13 Ala. R. 583; Stephens v. Brodnax, 5 *ib.* 258; Duffee v. Pennington, 1 *ib.* 506. Thus construed, it shows that "the defendant pleaded the general issue, with leave to give in evidence any matter of defense, and with like leave on the part of the plaintiff to give in evidence any matter in reply that was competent and legal;" that the note sued on was given for the unpaid balance of the price of certain negroes sold by the plaintiff to the defendant; that the plaintiff warranted the negroes to be sound in body and mind; that the defenses relied on at the trial were, 1st, breach of the warranty, and 2d, fraud in the sale; and that all the evidence adduced to sustain the defenses, was equally as admissible under the general issue, as it could have been under a plea of set-off. It appears from the record, that the amount of damages claimed by the defendant, for the breach of warranty and the fraud, was greater than the amount of the note sued on; but that the jury found *a general verdict* for the plaintiff, for $379 76, which is the full amount of the note sued on and interest, except about $117.

When, as in the present case, the defenses relied upon are as available under the general issue as under the plea of set-off, and the general issue is pleaded, with leave to give in evidence any matter of defense, the mere fact that the amount found for the plaintiff, by *a general verdict* in his favor, is less than the amount of the note sued on, does not entitle the defendant, under section 2378, to recover any costs, or to exemption from any costs. For,

although the jury made a deduction from the plaintiff's demands, they may have made it under *the general issue;* and if so, the defendant is not entitled to recover any cost. The only cost he can recover, when the verdict is against him, is the cost "sustained in establishing the set-off,"—that is, cost sustained in procuring an allowance to himself, or a deduction from the plaintiff's demand, *under what the law deems a plea of set-off.*

It is not a conclusion of law from the pleadings and verdict, or from the pleadings, verdict and bill of exceptions, that any "*set-off*" was "*established*" in this case. The pleadings, verdict, and bill of exceptions, are entirely consistent with the supposition, that the deduction made from the plaintiff's demand, was made under the general issue. And when the substance of all the pleadings and evidence is set forth in the record, and from them it is entirely uncertain whether the partial deduction from the plaintiff's demand was made under the general issue or under the plea of set-off, the judgment as to the costs must be controlled by *the general rule* laid down in section 2375 of the Code, and not by *the exception* defined in section 2378. Where a party claims under an exception, he must bring himself or his case within it.

It follows from what we have above said, that the court below erred in taxing the plaintiff with the costs, or amount of the witness-fees in the cause; and its judgment in favor of the defendant, which taxes the plaintiff with the witness-fees, is reversed and held for naught. This reversal leaves in full force the judgment in favor of the plaintiff, entered on the verdict for the amount thereby found for the plaintiff, and all the costs of the suit. The defendant must pay the costs of this appeal.

STONE, J., not sitting.

LEDBETER *vs.* BLASSINGAME.

[TRESPASS FOR TAKING WAGON.]

1. *What title will maintain action.*—One for whom a wagon has been manufactured, in pursuance of a contract, has not such a title to it as will support an action of trespass, until there has been an express or implied delivery and acceptance of it.

APPEAL from the Circuit Court of Marshall.
Tried before the Hon. WM. S. MUDD.

THIS action was brought by William Blassingame, against Solomon S. Ledbetter, to recover damages for the wrongful taking of a wagon, which had been manufactured for the plaintiff by one J. C. Cornwell, in pursuance of a contract between them, and which was sold by the defendant, as constable, under the order of a justice of the peace. The wagon never was delivered to the plaintiff, and never was in his possession. Before or about the time of its completion, Cornwell, the manufacturer, was summoned by process of garnishment, returnable before a justice of the peace, as the debtor of plaintiff; and, on answering that he "was indebted to plaintiff for a two-horse wagon, worth $75," the wagon was condemned in his hands by the justice, as the property of plaintiff, and was afterwards sold by the defendant, as a constable, under the order of the justice. On these facts, the court charged the jury, among other things, "that if they should believe from the evidence that, before and at the time of the service of the garnishment, Cornwell had the wagon finished, and ready to be delivered to plaintiff when called for, and was only holding the wagon for the use of the plaintiff, then plaintiff had such a possession, or right to the possession of the wagon, as would enable him to maintain this action." The defendant reserved an exception to this charge, and he now assigns it as error.

L. WYETH, for appellant.
B. F. PORTER, *contra.*

WALKER, J.—Construing the charge given by the court in reference to the evidence, we regard it as presenting the question, whether an action of trespass is maintainable, by one for whom a wagon has been manufactured, for the taking of it before its delivery, or before any act of acceptance or appropriation of it by the plaintiff.

To the maintenance of an action of trespass, it is necessary that the plaintiff should have had actual or constructive possession. If the plaintiff has title, it draws to it the possession, and he is by construction deemed to have had possession.—1 Chitty on Pleading, 168–169; Shipman v. Baxter, 21 Ala. 456. The plaintiff in this case never had actual possession, and whether he ever had constructive possession depends upon the question of title.

The title to an article manufactured for one, in pursuance to a contract, does not vest upon the mere completion of the article. It is requisite that there should be some express or implied acceptance of it.—Chitty on Contracts, 340–341; Wilkins v. Bromhead, 6 Man. & Gr. 963; Atkinson v. Bell, 8 Barn. & Cres. 277; Rhode v. Thwaites, 6 Barn. & Cres. 388; Moody v. Brown, 24 Maine, 107; 2 Kent's Com. 504; Clark v. Spence, 4 Ad. & El. 448; Addison on Contracts, 223; Rose v. Story, 1 Penn. State R. 190.

The charge given authorized the plaintiff to recover, although there had been no delivery of the wagon which was the subject of the suit, no acceptance of it, no appropriation of it by the plaintiff, and no consent by him that the wagon was his in pursuance to the contract with the manufacturer. Until there was such acceptance, delivery, or appropriation, the title remained in the manufacturer, and the wagon might have been sold for his debts; as was decided in the case of Atkinson v. Bell, *supra*. The charge was, therefore, erroneous.

The judgment of the court below is reversed, and the cause remanded.

STEAMBOAT THOMPSON *vs.* LEWIS & CO.

[LIBEL ON STEAMBOAT FOR MATERIALS AND REPAIRS.]

1. *Time of payment for goods sold.*—Generally, a debt for goods purchased is payable presently, unless some other time is fixed by the contract; but a different rule possibly applies to an account made up of a succession of items between the same parties.
2. *Limitation of lien on steamboat.*—The act of Feb. 15, 1856, (Session Acts 1855–56, p. 58,) enlarging the lien on steamboats to six months, instead of thirty days as provided by section 2706 of the Code, does not apply to causes of action on which the lien had been lost at the time of its passage.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. MCKINSTRY.

THIS was a proceeding in admiralty, instituted by Wm. H. Lewis & Co., against the steamboat *J. R. Thompson*, to enforce a claim for materials and repairs amounting to $188 62. An account, showing the different items of which the debt was composed, extending from the 21st December, 1855, to the 19th March, 1856, was annexed to the libel. The libel was filed on the 26th March, 1856; and alleged, that the debt accrued within six months last past, and that the sum of $188 62 was still due and unpaid, "besides interest from the dates thereof." William McGill intervened as stipulator, and filed an answer, alleging that the libellants' claim, if any was due, "accrued more than thirty days before the filing of said libel, to-wit, on the 29th December, 1855, or, at furthest, on the 4th January, 1856." The bill of exceptions states, "that the cause was submitted to the court on the effect of the law of the session of the legislature of 1855–56, changing the lien on steamboats, for repairs, &c., to six months; it being agreed by counsel, that the services rendered and work done, at the instance of the agent or master of the boat, were done and rendered at the times mentioned in the account, and for the price therein charged. The court thereupon rendered judgment for the libellants, for the

full amount of their account; to which the defendant excepted," and which he now assigns as error.

CHAMBERLAIN & ROBINSON, and O. S. JEWETT, for the appellant.

E. S. DARGAN, *contra.*

STONE, J.—The recital of the facts in this case, as found in the bill of exceptions, is not as full as could be desired. The copy of the account exhibited with the libel and complaint shows the dates when the several articles were furnished to the boat, but it is nowhere shown when the account was due. In the absence of an agreement or custom to the contrary, a debt for goods purchased is generally due and payable presently.—See Waring v. Henry & Mott, 30 Ala. 721; Shields v. Henry & Mott, at June term, 1857; Darby v. Steamboat Inda, 9 Mo. 645. Possibly the rule as applicable to this account is different, as it is made up of a succession of items between the same parties.

The bill of exceptions, however, in this case, relieves us from the consideration of this question; for it recites, that "the cause was submitted to the court upon the effect of the law of the session of the legislature of 1855–56, changing the lien upon steamboats, for repairs, &c., to six months." The act of the legislature here referred to, is the act "to change and modify section 2706 of the Code, in relation to the lien on steamboats," approved February 15, 1856.—Pamphlet Acts of 1855–56, pp. 58–59. It is contended for appellees, that the statute above referred to affects only the remedy; and that hence it operates on debts existing at the time of its enactment, as well as those afterwards contracted.

We do not think this argument a sound one. This is a proceeding under chapter 8, title 2, part 3 of the Code, page 491, §§ 2692, *et seq.* This chapter relates to proceedings in admiralty, and the remedy therein prescribed is *in rem*—against the boat itself. Previous to the act of 15th February, 1856, the lien provided by section 2692 of the Code, "for work done or materials supplied," contin-

ued only thirty days "after the maturity of the claim or debt."—§ 2706. After that time, such creditors had no remedy whatever against the boat. There may have remained a right of action against the persons who contracted to have the work done or materials supplied; but this was only a personal liability, not in any manner affecting the boat itself. To hold that, after the creditor had lost his lien on the boat by waiver or abandonment, the legislature could revive and re-establish the lien, would be to allow them to act directly on existing *rights of property*. This is a very different question from that which concedes to the legislature the right to alter or modify existing remedies.

In vindication of the correctness of this construction, let us suppose that, between the time when this lien was lost under section 2706 of the Code, and the enactment of the statute of 1856, this boat had passed into the hands of other owners. Would it not be a most shocking construction which would then revive a liability upon the boat, from which it was exempt when the contract of sale was perfected?

In the case of the Coosa River Steamboat Company v. Barclay & Henderson, 30 Ala., we laid down the following propositions, which are well fortified by authorities therein cited: 1. "It is not within the power of the legislature to take away vested rights. * * * * * * * * 3. It is not within the power of legislation to create a cause of action out of an existing transaction, for which there was at the time of its occurrence no remedy."

We think it clear that, if the lien on the boat was lost before the enactment of the statute of February 15th, 1856, that statute could not have the effect of reviving it.

Section 2480 of the Code relates only to the actions therein provided for, and has no influence upon this.

Judgment of the city court reversed, and cause remanded.

MATHIESON & O'HARA *vs.* THOMPSON.

[ATTACHMENT AND GARNISHMENT.]

1. *Costs allowed garnishee.*—A garnishee, whose answer is not controverted, is entitled (Code, § 2556) to mileage, as well as *per-diem* compensation, in each case in which he is summoned by a different plaintiff, although the garnishments are all returnable to the same term.

APPEAL from the Circuit Court of Wilcox.
Tried before the Hon. E. W. PETTUS.

THE appellee in this case was summoned, at the suit of the appellants and five other attaching creditors, as the debtor of J. B. & N. F. Camp; and filed an answer in each case, denying any indebtedness; which answer was not controverted. The garnishments were all returnable to the same term of the court. The garnishee resided in Butts county, Georgia; but the garnishment was served on him in Wilcox county, in this State, while on a visit. On these facts, the circuit court held, that the garnishee was entitled, in each case in which he was summoned, in addition to his *per-diem* compensation, to mileage from the court-house of the county to the State line, in the direction of his residence, by the route most usually traveled; to which the attaching creditors excepted, and which they now assign as error.

JNO. A. JACKSON, and COCHRAN & HOWARD, for the appellants.

WATTS, JUDGE & JACKSON, *contra.*

RICE, C. J.—"The pay of a juror"—that is, of a regular juror—"during his attendance," is the pay allowed by section 2256 of the Code to a garnishee whose answer is not controverted. That pay includes mileage, as well as the *per-diem* allowance.—Code, § 3481. The reason for allowing it to a garnishee is stronger than for allowing it to a juror. A juror can not be required to serve out of his

county. A garnishee may be required to answer orally in any court in the State, however distant from his home. Code, § 2540. The penalty for the failure of a juror to attend can not exceed one hundred dollars.—Code, § 3455. The loss which may result from the failure of a garnishee to answer, is bounded only by the plaintiff's claim, however great that may be.—Code, § 2545. The defaulting juror can be fined only once for failing to attend the court. The defaulting garnishee may be rendered liable for the claim of every plaintiff who causes him to be summoned. And although the language of the sections of the Code, which relate to the questions presented for our decision in this case, is obscure, and certainly admits of a construction different from that which we here adopt; yet we are fully persuaded that the construction here given carries out the real intention of the law-makers. We decide, that a garnishee, whose answer is not controverted, is entitled to mileage, as well as *per-diem* compensation; and that he is entitled thereto against the plaintiff in each garnishment, however many garnishments there may be, and notwithstanding they are all returnable to the same term. We think the rulings of the court below correct, and affirm the judgment.

HIBLER *vs.* McCARTNEY.

[ACTION AGAINST COMMON CARRIERS FOR LOSS OF COTTON.]

1. *Conclusiveness of adjudged cases.*—The correctness of the decision of this court, relative to the construction of a bill of lading given by a common carrier, which was made nearly twenty years ago, and which has been twice re-asserted, again quoted with approbation, and never departed from or assailed in any subsequent case, cannot now be questioned.
2. *Parol evidence of custom as to construction of bill of lading.*—Parol evidence is admissible, to show that the words "dangers of the river," as used in a bill of lading, by usage and custom include dangers by fire.
3. *Charge upon effect of evidence.*—The court may instruct the jury, that certain facts, hypothetically stated, constitute negligence in a common carrier.

4. *What constitutes negligence in common carrier.*—The owners of a steamboat are liable, as common carriers, for the loss of cotton, which was stored on the forecastle of the boat, torn, ragged and uncovered, and which was destroyed by fire communicated by sparks from a torch-light on the boat.
5. *Admissibility of custom on question of negligence.*—Evidence of a custom to carry torch-lights at night, on board of steamboats, cannot be received to affect the liability of the owners for a loss by fire caused by the negligent use of such lights.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by the appellant, against the owners of the steamboat *Eliza Battle*, as common carriers, to recover damages for the loss of seven bales of cotton, which were shipped on board of said boat at Warsaw, in Sumter county, to be delivered to Lyon, Hudson & Bush, in Mobile; and which were destroyed by fire while on the boat. The defendants pleaded, 1st, the general issue; and, 2d, "that by the terms of the contract under which defendants undertook to carry and deliver said cotton, the dangers of the river and of fire were expressly excepted, and said cotton was lost by fire, not from any negligence or want of care on the part of defendants, but from one of those casualties and dangers incident to the navigation of the Tombeckbe river, and without any fault on the part of defendants, their agents, or servants." The plaintiff replied to the second plea, 1st, "that said cotton was destroyed by fire, occasioned by and through the negligence, carelessness, and improper conduct of defendants, their agents or servants;" and, 2d, "that by the terms of the contract under which defendants undertook to carry and deliver said cotton, the dangers of fire were not expressly excepted, and said cotton was not destroyed by one of those dangers or casualties incident to the navigation of the Tombeckbe river, and for which defendants are not liable under their said contract, but said contract only excepted the dangers of the river."

On the trial, as appears from the bill of exceptions, the plaintiff proved the shipment of the cotton on board of the boat on the 25th March, 1854, his ownership of it, the defendants' ownership of the boat, and their failure to

deliver the cotton to the consignees. He also introduced in evidence, after proof of its due execution, the bill of lading given by the officer of the boat, which was in the usual form, and which stipulated that the cotton was to be delivered to the consignees in good order, "the dangers of the river only excepted." The defendants then offered to prove, "by several witnesses, that the term 'dangers of the river,' as used in the bill of lading, by usage and custom included losses by fire." The plaintiff objected to the admission of this evidence; but the court overruled his objection, and admitted the evidence; and the plaintiff excepted.

"The defendants then introduced evidence, tending to show that said cotton was destroyed by fire. No witness was able to state how the fire originated. There was evidence tending to show that it originated in the cotton on the larboard side of the boat, between the derrick and the steps which went up from the boiler deck to the second deck, about fifteen feet from the furnaces, and in the third tier of cotton from the furnaces; that it occurred when the boat was a few miles below Gainesville, between 12 and 2 o'clock at night; that the river was low, and the night dark; that there was a torch-light, made of pine-knots, hung out on the larboard side of the boat, about twenty feet from where the fire was first seen, and separated from the same by one tier of cotton; that the boat was running with a slight wind ahead; that the cotton on the forecastle, where the fire was discovered, was torn, ragged, and not covered by any thing; and that there was nothing between it and the torch-lights, to protect it from the sparks of the torch-lights. There was evidence, also, tending to show that steamboats, navigating said river at night, usually carried torch-lights; that it was not usual for them to cover the cotton with tarpaulins or any thing else; that torch-lights were necessary to the safe navigation of said river on a dark night, and the custom was to use them; and that the omission to use them would, in the opinion of the witnesses, be considered unsafe. The defendants showed, also, that there was but one torch-light; that it was held below the guards of the boat, by a

careful hand; and that the guards were about three feet above the water. The plaintiff introduced the deposition of one Rogers, who testified, that he was, and had been for seventeen years, the keeper of the warehouse at Warsaw, and was acquainted with the customs and usages of the river; and that the term, 'dangers of the river,' according to the understanding of the trade on said river at Warsaw, did not include casualties by fire.

"The court charged the jury, that if they believed from the evidence that the exception, 'dangers of the river,' as used in the bill of lading, according to the usage and custom of the trade included fire, then the plaintiff could not recover, unless the fire originated through the defendants' negligence or want of care; that if they believed fire to be a danger of the river, and that the cotton was destroyed by fire, the burden of proof was then shifted to the plaintiff, to show that it originated through negligence.

"The plaintiff excepted to this charge, and then asked the court to instruct the jury as follows:

"1. That by the term 'dangers of the river only excepted,' as used in the bill of lading which is the contract between the parties to this suit, the defendants are not excused, if the jury find that the plaintiff's cotton was destroyed by fire.

"2. That no custom or usage can add to, vary or contradict the written express contract of the parties.

"3. That the exception, 'dangers of the river,' is a condition separate and distinct from dangers of fire; and that the defendants are not excused, under the bill of lading in this case, even though the jury should believe from the evidence that the plaintiff's cotton was destroyed by accidental fire.

"4. That although the jury may believe from the evidence that it was usual for steamboats, running at night, to carry torch-lights; and that they do not, under these circumstances, usually cover the cotton with tarpaulin or anything else; yet, if they also believe that the cotton was exposed to the sparks from the torch-lights, and that the fire in this case did originate in that source,—this is, *prima facie*, such negligence as will make the defend-

ants liable, although the bill of lading excepts the dangers of fire.

"5. That if the jury should believe that the cotton on the forecastle of the steamboat was torn and ragged, and was uncovered, and exposed to the sparks from the torch-lights; and that the fire originated in said cotton from the torch-lights, and was communicated to plaintiff's cotton,—this is such negligence as will render the defendants liable in this suit, although the jury should believe that it was usual for steamboats to carry torch-lights, and notwithstanding the dangers of fire are excepted in the bill of lading."

The court refused each one of these charges, and the plaintiff excepted; and he now assigns as error the admission of the evidence to which he objected, the charge given by the court, and the refusal of the several charges asked.

D. Chandler, and Thos. H. Herndon, for the appellant. 1. It is admitted, that the ruling of the court in the admission of parol evidence to show that the term "dangers of the river," as used in the bill of lading, included dangers by fire, is fully sustained by the case of Gazzam v. Sampson, 6 Porter, 123; but that case, it is submitted, is wrong in principle, unsustained by authority, contrary to public policy, and ought to be overruled.—19 Ala. 383; 2 Smith's L. C. 512; 13 Pick. 176; 2 Barr, 237; 5 Wendell, 187; 14 Wendell, 30; 7 Yerger, 340; 3 C. & H.'s Notes, 1439; 1 Bibb, 371; 3 Hawks, 580; 4 Ham. (Ohio) R. 334; 2 Sumner, 568; 5 Yerger, 82; 4 Yerger, 48; 3 S. & P. 136; 4 S. & P. 382; 3 Watts, 178; 4 Rawle, 195; 2 John. 327; 2 Wash. C. C. 24; 6 Binney, 416; 9 Metc. 306; 13 Ala. 824; 28 Ala. 704; 6 Cowen, 266; 21 Wendell, 194; Chitty on Contracts, 100; Angell on Carriers, §§ 228–30; 1 Hall, 619; 15 Mass. 431; 3 Hill's (N. Y.) R. 593.—If the case is wrong in principle, as is abundantly shown by these authorities, there is no reason why it should not be overruled. It settles no rule of property; no rights have grown up under it; and no hardship will result from the overruling of it.

2. The fourth and fifth charges asked, ought to have been given. The facts stated made out a clear case of negligence against the defendants, even if they could avail themselves of the custom which they sought to establish.

E. S. DARGAN, *contra.*—1. The rulings of the court on the evidence, in the charge given, and in the refusal of the first three charges asked, are fully sustained by Gazzam v. Sampson, 6 Porter, 123.

2. A common carrier is bound to carry the goods in the usual way.—Flanders on Shipping, 207. The evidence shows, that the cotton was stored, and the boat navigated, in the usual way; and the record fails to show, that the defendants did any act which they ought not to have done, or omitted to do any thing which they ought to have done, according to the established usages of the trade.

3. Negligence is a question of fact for the jury, which the fourth and fifth charges asked would have taken from their consideration.—Angell on Carriers, 27, 28; Story on Bailments, § 11; 5 Shep. (18 Maine) R. 174; 3 Mason, 132; 3 Bing. (N. S.) 208; 11 Wendell, 25; 12 Howard, 280; 9 C. & P. 380.

WALKER, J.—In the case of Sampson & Lindsay v. Gazzam, 6 Porter, 123, this court decided, that it was permissible for a steamboat owner, when sued for the loss of goods by fire, to show by parol that the exceptive words, "dangers of the river," in a bill of lading, by usage and custom included dangers by fire. That decision was made nearly twenty years ago; at the next succeeding term of the court, was approved, and its doctrine re-asserted, in the cases of Ezell v. English, 6 Porter, 311, and Ezell v. Metter, 6 Porter, 307; and was quoted with manifest approbation, as late as 1848, in the opinion in Knox v. Rives, Battle & Co., 14 Ala. 249. It has never been departed from, or assailed, in any subsequent decision; but has, for nearly twenty years, stood in our reports, an unassailed and approved exposition of the law of the

class of contracts to which it pertains. It must necessarily have entered as an element into the contracts of carriers by water in this State, controlling the terms of the clause designed to except from the stringent rule of responsibility prescribed by the common law. We must presume that, in so long a time, it may have become known, and passed into a rule of contract, alike with carriers by water, and their customers. To depart from such a decision, would produce the same injustice which results from retrospective legislation. It would, in effect, say to the persons affected by it, Although you had the assurance of a decision of the highest judicial tribunal of the State, standing undisputed for nearly twenty years, and afterwards twice approved, of the law applicable to your contract; and although, when you made your contract, you and the other contracting party arranged the stipulations in reference to that decision; yet your rights and your liabilities shall be settled according to a different view of the law. For these reasons, we decline to consider and pass upon the arguments and authorities which have been adduced for the purpose of showing the incorrectness of the above stated principle settled in Sampson & Lindsay v. Gazzam. That principle must now be regarded as the settled law of the State. Maintaining that principle, we must approve the ruling of the court in the admission of the evidence objected to, and also the charge given by the court.

The first and third charges asked by the plaintiff, would have taken from the jury the consideration of the question, whether the expression, "dangers of the river," did not, by custom and usage, have a meaning sufficiently comprehensive to include dangers by fire; and were, on that account, properly refused.

The second charge asked was, that no custom or usage could add to, vary, or contradict the written express contract of the parties. This charge was abstract, unless it could effect the exclusion of the testimony as to the import, according to usage and custom, of the words "dangers of the river." The charge was not entitled to any operation on the case, and would have contributed to

the confusion of the jury, by opening the door for their consideration of the question, whether the principle of law asserted by the charge required an exclusion of the evidence as to the custom. There was no error in the refusal of this charge.

If the facts presented in the fifth charge asked admit of no inference opposed to the conclusion that the defendant was guilty of negligence, it should have been given. Stanley v. Nelson, 28 Ala. 515; Eldridge v. Spence, 16 Ala. 682; Nelms v. Williams, 18 Ala. 650; Bryan v. Ware, 20 Ala. 690; Williams v. Shackelford, 16 Ala. 318; Henderson v. Mabry, 13 Ala. 713.

This charge suggests the question, whether or not the holding of a torch by a carrier, in such manner as to expose uncovered, ragged cotton to the sparks from it, and thus to ignite it, is negligence. Does this conduct involve the omission of that caution and care, which a prudent man would exercise about his own business? This is the test of negligence; and when this test is applied, the conclusion is inevitable, that the act was clearly one of negligence. No prudent man, in taking care of his own ragged and uncovered cotton, would hold a torch in such a manner that sparks would fall upon it. The facts presented in the charge admitted of no other inference than that which the court was asked to draw; and it was, therefore, the duty of the court to give it.

This result would not be changed by the existence of a custom of carrying torches at night. A custom, which would authorize a carrier to carry a torch, in such a manner as to endanger the cargo, would be violative of law and good faith, and could not receive judicial sanction. Barlow v. Lambert, 28 Ala. 704. If a boat cannot be run at night, without the aid of torches, carried in such a manner as to endanger the cotton on freight, to stop is the plain duty of the carrier. Custom cannot relieve from the obligation to bestow, even in guarding against the excepted danger from fire, reasonable care and diligence in taking care of the freight. The law cannot justify a postponement of the safety of the cargo, to the desire of a speedy passage to the point of destination.

We do not inquire whether the fourth charge asked should have been given, as the fifth will cover the entire case so far as the question of negligence is concerned.

The judgment of the court below is reversed, and the cause remanded.

HALL *vs.* BALDWIN, PHELPS & CO.

[GARNISHMENT ON JUDGMENT.]

1. *Negotiable note subjected by garnishment.*—A bill in chancery having been filed, against both vendor and purchaser, seeking a recovery of either the land itself or the unpaid notes for the purchase-money; and the notes, which were negotiable and payable in bank, being thereupon placed in the hands of a bailee, by agreement between the maker and the payee, to abide the final determination of the suit,—the amount due on the notes may, after their maturity, and after the final dismissal of the bill in chancery, be subjected by garnishment against the maker, at the suit of the payee's creditors.
2. *Judgment against garnishee corrected and affirmed.*—A judgment against a garnishee, in favor of a judgment creditor, should be for the aggregate amount of the plaintiff's judgment, with interest and costs, if less than the amount of the admitted indebtedness, and should specify the amount; but, if the record shows the facts, the appellate court will correct the judgment, at the costs of the appellant, and render judgment for the proper amount.

APPEAL from the Circuit Court of Mobile.
Tried before the Hon. THOS. A. WALKER.

THE appellant was summoned, on the 29th December, 1851, by process of garnishment, at the suit of the appellees, as the debtor of A. S. Aycock, against whom the appellees had recovered a judgment, in said circuit court, on the 29th February, 1847, for $1065 66; and filed an answer, in these words: "John Hall, garnishee in this cause, for answer thereto, says, that he was not indebted to said A. S. Aycock, at the time of the service of the garnishment, otherwise than that, in March or April, 1850, he

agreed to purchase from said Aycock a tract of land, situated in Mobile county, and known as the 'Clements' old mill;' for which he agreed to pay $1750, paid $250 cash, and, upon the consummation of the purchase, executed to said Aycock his two promissory notes, for $750 each, endorsed by Joseph Hall, negotiable and payable at the Bank of Mobile; one due on the 1st November, 1851, and the other on the 1st May, 1852. Some time before the service of this garnishment, Jane Clements, Adeline Clements, and Samuel Clements, heirs of Joshua Clements, deceased, commenced suit against said Aycock, this respondent and others, for the recovery of said land, or the amount of said promissory notes; which suit is now pending in the chancery court of Mobile. Upon the commencement of said suit, or soon afterwards, said notes were deposited with Henry Chamberlain, esq., upon a written agreement between this respondent and said Aycock, that they were to remain in the hands of said Chamberlain until the final determination of said suit; and if the said Clements should recover in said suit, the amount to the extent of such recovery to be deducted from said notes by this respondent; and if they should fail in said suit, then the said notes to be given up to the said Aycock. This affiant, further answering, says, that he has been informed by said Aycock, that his wife, Mrs. Jane Aycock, is the beneficial owner of said notes; therefore, respondent does not admit any indebtedness to said Aycock at the time of the service of said garnishment; nor has he any effects, nor had he at that time any property of said Aycock in his possession; nor does he know of any other person who is indebted, or who has effects or property in his or their possession."

This answer was filed on the 20th April, 1852; and a citation was thereupon issued to Mrs. Jane Aycock, and to said Jane, Adeline and Samuel Clements, to appear and contest with the plaintiffs their respective rights to the notes. In obedience to the citation, Mrs. Aycock appeared, and an issue was made up between her and the plaintiffs, which was found against her; and a judgment was thereupon rendered, establishing the plaintiff's right,

as against her, to the condemnation of the proceeds of the notes. The other parties cited having failed to appear, a similar judgment was rendered against them.

On the 3d May, 1856, judgment final was rendered against the garnishee, which, after reciting the appearance of the parties, and setting out the answer in full, proceeds thus: "And judgments having been heretofore duly rendered against the several claimants suggested in the answer of the said garnishee; and it being admitted that the chancery suit therein described has been finally determined, and that the complainants in said suit have wholly failed therein; and it appearing to the court that the defendant is indebted to the plaintiffs, by a judgment rendered in the county court of Mobile on the 29th February, 1847, for the sum of $1,000, besides $14 06 costs of suit: It is therefore considered by the court, that the plaintiffs have and recover of said John Hall, garnishee as aforesaid, the said sum of $1,000, with the interest thereon, and the said sum of $14 06 costs of said original suit, together with the costs of this proceeding; which sums shall be a discharge, to that extent, of the indebtedness of said garnishee to said A. S. Aycock."

The judgment against the garnishee is assigned as error.

JOHN T. TAYLOR, for the appellant.

A. J. REQUIER, *contra.*

STONE, J.—Without determining what our decision would be, if this record showed that the judgment was rendered before the maturity of the notes, we think the circuit court did not err in deciding that the plaintiff was entitled to a judgment against the garnishee. The notes, though payable in bank, were overdue when the judgment was rendered; and it is inferable from the record that they had matured before they became the absolute property of Aycock, under the second arrangement. Under these circumstances, no subsequent transfer of the notes by Aycock could expose the garnishee to another recovery on them. The recital in the record shows, that the

parties admitted that the contest on the validity of the transfer had been abandoned and determined; and there existed no reason why judgment should not have been rendered against the garnishee.

In rendering the final judgment against the garnishee, the circuit court committed a clerical error. That judgment was rendered on the 3d day of May, 1856. It should have specified the amount for which judgment was then rendered, and should not have left the amount uncertain, to be ascertained by a computation of interest. The record, however, contains sufficient facts to enable us to render such judgment as the circuit court should have rendered. The amount due from the garnishee, according to his answer, was, on May 3d, 1856, about two thousand and ten dollars.

The judgment of the circuit court is reversed; and this court, proceeding to render such judgment as the circuit court should have rendered, doth hereby order and adjudge as follows: Came the parties by their attorneys; and it appearing to the satisfaction of the court, from the answer of the garnishee, and the admissions of the parties, made in open court, that at the time the garnishee was summoned, he was indebted to the defendant, A. S. Aycock, by two promissory notes, which, together with interest up to May 3d, 1856, amount to about the sum of two thousand and ten dollars, which is still due; and it being shown to the court that, on the 27th day of February, 1847, the plaintiffs recovered a judgment, in the county court of Mobile county, against the defendant, A. S. Aycock, for the sum of one thousand dollars, besides the sum of fourteen 6-100 dollars costs of suit, the whole of which is unpaid; and the amount of said judgment, with interest thereon up to May 3d, 1836, including said costs, being the sum of seventeen hundred and twenty-nine 50-100 dollars: It is therefore, on motion of plaintiffs, considered and adjudged by the court, that the plaintiffs recover of said garnishee, John Hall, said sum of seventeen hundred and twenty-nine 50-100 dollars, together with the costs of said garnishment proceedings in the court below; it appearing that such recovery and costs

do not exceed the amount due from the garnishee to Aycock. This judgment to bear interest from May, 3d 1856.

Let the costs of this appeal be paid by the appellant.

FALCONER *vs.* HEAD.

[GARNISHMENT ON JUDGMENT.]

1. *Oral and written answer of garnishee.*—Where the judgment against the garnishee, rendered on the fifth day of the term, recites that he had "filed his answer within the time prescribed by law;" and the only answer set out in the record purports to have been made in open court, and to have been "filed in office" on the day the judgment was rendered, the appellate court will consider the answer to have been first made orally in open court, and to have been afterwards committed to writing and filed on the day shown by the clerk's endorsement.
2. *When money in hands of clerk is not subject to garnishment.*—The defendant in attachment having obtained a judgment in detinue against the sheriff, for property which was exempt from levy and sale under execution; and the sheriff having thereupon paid the assessed value of the property to the clerk of the court,—the money in the hands of the clerk cannot be subjected by garnishment at the suit of the defendant's creditors.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. NAT. COOK.

THE record in this case shows the following facts: On the 10th April, 1855, William B. Head obtained a judgment, in said circuit court, against John C. Oldham; and on the 6th March, 1856, sued out a garnishment thereon, which was served on Alexander H. Falconer, the clerk of said court. The garnishee's answer, as set out in the record, is marked in the marginal entry, "Filed in office 12th April, 1856," and is in these words: "Personally appeared in open court A. H. Falconer, who, being sworn, for answer to garnishment in favor of W. B. Head, says, that by virtue of an attachment issued against John C. Oldham, in favor of said plaintiff, certain articles of house-

hold furniture were levied on by Isaac Oliver, sheriff of Greene county, on the 4th September, 1854; that an action of detinue was brought against said sheriff, by said John C. Oldham, to whom said articles of household furniture belonged, on the ground that the same were exempt from levy and sale, under legal process; that said action was tried at the October term of this court, 1853, and resulted in the recovery of said articles or their alternate value, estimated by the jury at $39; that the sheriff paid the alternate value of said property to this garnishee, as clerk, together with the interest thereon, amounting to $40·25, which amount he now holds, and has in his possession, subject to the order of this court; that he is not indebted in any other way to said Oldham," &c. On the 12th April, 1856, the court rendered judgment against the garnishee, for $40 25, admitted to be in his hands as clerk; the judgment reciting that "the garnishee having filed his answer within the time prescribed by law, from which it appears," &c. The garnishee appeals from this judgment, and now assigns it as error.

R. F. Inge, and J. D. Webb, for appellant.
John G. Pierce, *contra.*

RICE, C. J.—The judgment entry shows, that the judgment against the garnishee was rendered upon an answer which he had filed. There is nothing in the record which would make the supposition a reasonable one, that more than one answer was filed by him. The fact that the only answer filed appears from the endorsement on it to have been filed on the 5th day of the term, is explained by the fact, that the answer was made "in open court," in the first instance, and afterwards written out. The date of the filing endorsed on the answer refers to the actual filing of the writing; whilst the judgment entry, in speaking of the answer as filed "within the time prescribed by law," refers to the time when the same answer was made "in open court." This construction makes the whole record consistent with itself; and adopting that construction, we must regard the answer in the record as

the answer on which the judgment was rendered, and as part of the record.—Easton v. Lowery, 29 Ala. R. 454; Lewis v. Dubose, *ib.* 219.

If the answer does not admit an indebtedness of the garnishee to the judgment debtor, the judgment against the garnishee cannot be sustained.—Code, § 2541; Price v. Thomason, 11 Ala. R. 875. There is no direct admission in it of such indebtedness; and the question is, whether, from the facts stated in it, the conclusion of law is that such indebtedness existed. To that question we are compelled to respond in the negative. If we were to decide otherwise, we should give to the plaintiff in the garnishment the mastery over the exemption law, and arm him with an *election* which the law has secured to the successful plaintiff in the action of detinue. To make this last clause more intelligible, it is necessary to call attention to the facts stated in the answer, and to section 2197 of the Code, which provides, that "any party recovering specific property, *may compel its restoration*, when practicable, by a writ of *distringas*, or by moving for an attachment." The answers shows, that the money, which it was the object of the garnishment to reach, was the assessed value of *specific property recovered by the judgment debtor*, *Oldham*, in an action of detinue against the sheriff, who had levied on them under an attachment in favor of the present plaintiff, Head; they being exempt under our statute from levy and sale under legal process. The exemption was allowed by the statute, not for the use of Oldham, but for "the use" of his family.—Code, § 2462. Oldham, as the head of the family, was the proper party to bring the action of detinue; but the recovery inures to the use of his family. He, as the successful plaintiff in the action of detinue, was not bound to accept the *assessed value* of the property recovered. Section 2197 of the Code secured to him the right *to "compel the restoration"* of the property itself, if practicable. In defiance of this right of Oldham, the sheriff, the defendant in the detinue suit, voluntarily paid to the garnishee, as clerk of the court, the assessed value of the property. It does not appear that Oldham *accepted* or *agreed to accept the assessed value*,

thus paid to the clerk; nor that in any manner he *elected* to take the value, and waive his right to *a restoration of the property itself*. His mere passiveness could not amount to an election or a waiver. To destroy his right to elect, or to constitute a waiver of his right, it was essential that *he should act*—should *do something* indicating at least his willingness and purpose to take the value rather than the property.—Blann v. Crocheron, 20 Ala. R. 320. Until *he* did something of that kind, the money in the hands of the sheriff could not be reached, *as his money*, by a garnishment sued out by his creditor. For, even if Oldham could have elected to treat the money as his own, and could thereupon have sued for and recovered it from the clerk, his creditor cannot make the election for him, and cannot recover the money from the clerk by garnishment. Lewis v. Dubose, *supra*.

The answer does not in any manner show an indebtedness of the garnishee to the judgment debtor of the plaintiff. The court below erred in not discharging the garnishee. Its judgment is reversed, and a judgment must be here rendered discharging the garnishee; and the plaintiff in the garnishment must pay the costs of this court, and of the court below.

FAULKS *vs.* HEARD & DUE.

[ATTACHMENT AND GARNISHMENT.]

1. *Form and sufficiency of judgment against garnishee.*—A judgment against a garnishee, condemning a specified sum found due from him to the defendant, must specify the amount of the plaintiff's judgment against the defendant. (WALKER, J., *dissenting*.)
2. *As to amendment and affirmance of judgment*—A judgment against a garnishee, which is fatally defective because it does not specify the amount of the plaintiff's judgment against the original defendant, cannot be corrected and affirmed on error, when the record nowhere discloses the facts necessary to authorize the amendment.

3. *What constitutes record of garnishment case.*—When an appeal is taken by a garnishee from the judgment rendered against him, the judgment against the original defendant constitutes no part of the record of the cause, unless made so by bill of exceptions, or in some other appropriate manner. (WALKER, J., *dissenting.*)
4. *Affidavit contesting garnishee's answer.*—The plaintiff's attorney may make the affidavit required by the statute, for the purpose of contesting the answer of a garnishee.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. ROBERT DOUGHERTY.

THE appellees commenced suit, by original attachment, issued on the 23d June, 1852, against Levi M. Sennett; and summoned the appellant by process of garnishment, on the 24th June, as the debtor of said Sennett. At the return term of the garnishment, the garnishee answered, denying any indebtedness; but his answer was controverted on the affidavit of the plaintiffs' attorney, and the issue formed thereon was found against him. Judgment final against the garnishee was rendered at the April term, 1855, in these words: "This day came the plaintiffs, by their attorney, the issue being a contest of the answer of John P. Faulks, garnishee; and thereupon came a jury of good and lawful men," &c., "who, upon their oaths, do say, 'We, the jury, do say and find that the said garnishee, John P. Faulks, is indebted to the said defendant, Levi M. Sennett, in the sum of $276 62; and it appearing to the satisfaction of the court that the said plaintiffs' judgment against the said Levi M. Sennett is unsatisfied: It is therefore considered by the court, that the plaintiffs, Heard & Due, recover of the said John P. Faulks the said sum of $276 62, assessed by the jury as aforesaid, together with the costs; for which execution may issue."

The garnishee appeals from this judgment, and now assigns it as error, on the following (with other) grounds: 1st, that it nowhere specifies the amount of the plaintiffs' judgment against the defendant in attachment; and, 2d, that the plaintiffs' attorney was not authorized by the statute to make the affidavit contesting the garnishee's answer.

ELMORE & YANCEY, for the appellant.
N. S. GRAHAM, *contra.*

STONE, J.—The judgment against the garnishee is fatally defective. It does not recite the amount of the judgment against the defendant in attachment; and hence we cannot know that the appellees are entitled to the judgment for two hundred and seventy-six 62-100 dollars, which they recovered against the garnishee. Neither does the answer of the garnishee, or any other part of the record of the recovery against the garnishee, show the amount of the judgment against the defendant in attachment; and it follows, that we have nothing by which to amend the judgment against the garnishee.—Case & Pate v. Moore, 21 Ala. 758; Jackson v. Shipman, 28 Ala. 488; Travis v. Tartt, 8 Ala. 574; Cook v. Walthal, 20 Ala. 334.

A *certiorari* to bring up the judgment against the defendant in attachment cannot help this record, as such judgment, if brought up, could not here be looked to or considered a part of the record, to sustain the judgment against the garnishee.—Gunn v. Howell, 27 Ala. 663, and authorities cited.

RICE, C. J., agrees with me.

WALKER, J.—I differ from my brethren, as to the necessity of reciting, in the entry of the judgment against the defendant in garnishment, the amount of the judgment against the defendant in attachment. In my opinion, the proceeding by garnishment, as the means of serving an attachment, although in some sense a distinct suit, belongs to and is a part of the record in the attachment suit. Such is the opinion indicated by this court, in Blair v. Rhodes, 5 Ala. 648. Such seems to be the necessary result of the decision, that this court would reverse a judgment in garnishment, because the record of the original attachment disclosed that the attachment was issued by one having no authority.—Flash, Hartwell & Co. v. Paul, Cook & Co., 29 Ala. 141. Such, too, seems to be the necessary result of those cases which hold, that the court will look to the evidence of indebtedness disclosed in the

garnishment proceeding, for the purpose of supporting the judgment against the defendant in attachment.—Bratton v. McGlothlen, 20 Ala. 146.

Again; this court has decided, even in a case of garnishment issued after judgment, that the defendant in garnishment might move to quash the garnishment, upon the ground that the record in the orignal cause disclosed that the judgment was satisfied.——Thompson v. Wallace, 3 Ala. 132.

It is the opinion of the entire court, that the affidavit, preliminary to the contest of the correctness of the answer, is sufficient, upon the authority of the case of Foster, Nostrand & Co. v. Walker, 2 Ala. 177. It is agreed by all the members of the court, that it was competent for the plaintiffs' attorney to make the affidavit.

The judgment is reversed, and the cause remanded.

HUGHES *vs.* HUGHES' EXECUTOR.

[CONTEST AS TO VALIDITY OF WILL.]

1. *Opinion and belief of witness held synonymous.*—When a subscribing witness to a will testifies to his *belief* of the testator's mental capacity, and his deposition shows that he used the words as synonymous with *opinion*, the answer will not be suppressed.
2. *Admissibility of former will.*—Where the probate of a will is contested, on the grounds of mental incapacity, fraud, and undue influence, another will, executed by the testator eight years previously, and making a different disposition of his property, is admissible evidence for the contestants. (Overruling *Roberts v. Trawick*, 13 Ala. 68.)
3. *Proof of execution of former will.*—The testimony of one of the subscribing witnesses to a will, executed about fifteen years previously, to the effect that the body of the instrument and his own signature are in his handwriting, although he has no recollection of it aside from the instrument itself, "and that he takes it for granted that said H. [testator] made his mark thereto, as he was unable to write," is, *prima facie*, sufficient proof of execution to let the instrument go before the jury.
4. *Hearsay inadmissible.*—A witness, testifying to the mental incapacity of the testator, cannot be allowed to detail conversations between herself and third persons, relative to the testator and the cause of his eccentricities.

5. *Charge as to effect of inequality of distribution on validity of will.*—A charge to the jury, asserting that an unequal distribution of the testator's property among his children "is no legal reason that it should be considered an irrational act," is not erroneous, though it may be calculated to mislead the jury.

APPEAL from the Probate Court of Pickens.

IN the matter of the last will and testament of Thomas Hughes, deceased, which was executed in South Carolina, in February, 1847; was propounded for probate in February, 1854, by William C. Dunn, the executor therein named, who had married the testator's only daughter; and was contested by Thomas Hughes, the testator's only son, on the grounds of mental incapacity, fraud, and undue influence. The several rulings of the court on the trial of the issue, to which exceptions were reserved by the contestant, may be thus stated:

The contestant moved the court to suppress the answer of one Gondelock, one of the subscribing witnesses to the will, to the fifth direct interrogatory. This answer was as follows: "The said Thomas Hughes was, at the time of signing and publishing the said paper, of sound and disposing mind and understanding, as I do verily believe." One Sims, another subscribing witness, adopted the answers of said Gondelock as his own; and the same answer was objected to in each case. The court overruled these objections, and the contestant excepted.

After the proponent had rested his case, the contestant offered the deposition of one David Johnston, for the purpose of proving the execution by said testator, in 1839, of another will, by which he made an equal distribution of his property between his son and daughter, (the contestant and the proponent's wife,) and appointed the contestant and proponent his executors. This will was made an exhibit to the deposition; and the only proof of its execution was contained in the answer to the third interrogatory, in these words: "He has no recollection, apart from the writing now exhibited to him, bearing date the 21st October, 1839, and purporting to be the last will and testament of Thomas Hughes. The body of the instru-

ment is in deponent's own handwriting, and subscribed by himself, Daniel Thomas and Edward C. Johnston as witnesses; and he takes it for granted that said Hughes made his mark thereto, as he was unable to write, in consequence of a paralytic stroke received some time before; and deponent would not have subscribed his name as a witness thereto, if said Hughes had not declared it to be his last will and testament." The court sustained the proponent's objection to this answer and the exhibit, when offered separately, "and in connection with the testator's declaration, made before the execution of the will propounded for probate, that he intended to divide his property equally between his son and daughter; and in the absence of evidence, except as shown by the will propounded for probate, of a change of such intention; and in connection with other circumstances tending to show mental incapacity to make the alleged will." The contestant reserved exceptions to the exclusion of this evidence.

For the purpose of proving the testator's mental incapacity, the contestant offered in evidence the deposition of Mrs. Nelly Evans, whose answer to the fourth interrogatory contained this language: "Some persons would ask me, when at my house, when he was very lively, if he was not drunk; and I told them he was not—that he had no liquor with him, and there was none about my house, and I saw no sign whatever." The court suppressed this part of the answer, on the proponent's objection; and the contestant excepted.

The court charged the jury, at the request of the proponent, "that if they believed from the evidence that the testator, by the paper propounded as his will, made an unequal distribution of his property among his children, yet this is no legal reason why it should be considered an irrational act;" to which charge the contestant excepted.

All the rulings of the court above stated, to which exceptions were reserved, are now assigned as error.

TURNER REAVIS, for appellant.—1. The answers of Gondelock and Sims should have been suppressed, because they only state the *belief* of the witnesses, not their *opinions*. Their belief may have been founded on information merely.—1 Green. Ev. (8th ed.) 573. Even if belief be held equivalent to opinion, the evidence ought not to have been admitted, because it does not appear that the witnesses had such acquaintance with the testator as would authorize them to express an opinion.—24 Ala. 241.

2. The former will, executed when the testator was sane, consistent with his uniformly declared intentions, and inconsistent with the will propounded for probate, was competent evidence for the contestant, in connection with the other evidence of mental incapacity.—Irish v. Smith, 8 Serg. & R. 573; Love v. Johnston, 12 Iredell, 355; Marsh v. Tyrrell, 2 Hagg. (4 Eng. Ec. 72;) Dodge v. Meech, 1 Hagg. 612, (3 Eng. Ec. 257;) Couch v. Couch, 7 Ala. 524; Gilbert v. Gilbert, 22 Ala. 529; Jennings v. Blocker, 25 Ala. 415; Roberts v. Trawick, 17 Ala. 55. This position, it is contended, does not conflict with Roberts v. Trawick, 13 Ala. 68, where the testator's capacity was admitted; but, if it conflict, the authorities above cited, it is submitted, show that case to be wrong. That the proof of the execution of the will was sufficient to let it in as evidence, see Graham v. Lockhart, 8 Ala. 10; 3 C. & H.'s Notes to Phil. Ev., p. 1349, note 929.

3. That portion of the deposition of Mrs. Evans which was suppressed, was admissible evidence as a part of the *res gestæ*.—1 Greenl. Ev. § 101, note 2; Irish v. Smith, 8 Serg. & R. 573; 2 C. & H.'s Notes, 585, note 444.

4. There was other evidence before the jury, tending strongly to show the testator's incapacity to make a will, besides the single fact, on which the charge of the court was predicated, that the will made an unequal distribution of the property. The charge was calculated to withdraw the minds of the jury from the other facts, and yet attached no importance to the single fact stated. Its effect was, that an unequal distribution of property is no evidence of incapacity.—1 Jarman on Wills, (3d Am. ed.) 81, 82, and

notes; Roberts v. Trawick, 13 Ala. 68. If the charge given in Coleman v. Robertson, 17 Ala. 85, which seems opposed to this view, can be sustained, it must be on the ground, that there was no other evidence of incapacity than the single fact that the will made an unequal distribution.

S. F. HALE, *contra*.—It is competent for a subscribing witness to give his opinion as to the testator's capacity. 2 Iredell, 79; 1 Greenl. Ev. § 440, note 5; 2 *ib.* § 691. *Belief*, as the word was used by the witnesses, is equivalent to *opinion*.

2. The proof of the execution of the former will was not sufficient to give it validity as a will, nor to authorize its admission as an instrument of evidence.—Dewey v. Dewey, 1 Metcalf, 351.

3. If its execution had been sufficiently proved, it would not have been relevant evidence.—Roberts v. Trawick, 13 Ala. 83; Bunyard v. McElroy, 21 Ala. 315; 4 Wash. C. C. 262.

4. There is no principle of law which would authorize the admission of that part of Mrs. Evans' deposition which was suppressed, consisting of conversations between herself and third persons.

5. The charge of the court is sustained by the case of Coleman v. Robertson's Executors, 17 Ala. 84.

STONE, J.—There is an agreement in this record that the answer of Gondelock to the 5th interrogatory, may be regarded as the answer of Sims; and consequently, the 1st, 2d and 3d assignments of error present but one question. The objection to this answer is, that the subscribing witnesses stated their *belief* that the testator was of sound mind, and not their *opinion* that such was the case. In the connection in which this word is used by the witnesses, there is but little difference between the import of the words, belief and opinion. Neither implies actual knowledge; while each expresses a persuasion or probability of the truth of the proposition, based, in this case, on the evidence furnished by the appearance and

manner of the testator; corroborated, probably, by a previous knowledge of him. Mr. Greenleaf seems to use the words convertibly.—1 Greenl. Ev. § 440. This objection was rightly overruled.

2. The 4th, 5th and 6th assignments may be considered together. They present the question of the admissibility of a former will of the testator, as evidence for the contesting party, on the trial of the issue *devisavit vel non.*

In the case of Roberts v. Trawick, 13 Ala. 68, 82, our predecessors said: "We can not perceive on what principle the witness Whitron was permitted to give evidence of a will executed by the testator some twelve years anterior to the one in controversy, by which, it is said, the testator made an equal division of his property among his children," If this decision be adhered to as a precedent, it is decisive of the 4th, 5th and 6th assignments of error, for they all relate to the same question. The argument in this case attacks that decision, and we are asked to review it.

I have duly considered this question; and, while I would prefer to adhere to the above decision, believing as I do that no material injury in practice can grow out of it, my brothers are of a different opinion, and are in favor of overruling it. I do not myself believe it can be sustained, either on principle or authority. In the very paragraph from which the above extract is taken, the following language occurs: "If a will be made in conformity to a fixed determination, entertained and expressed for years, this, it is held, is strong proof of capacity." Couch v. Couch, 7 Ala. 519, is referred to as sustaining this proposition, and does sustain it. Now, with all due deference, we submit, is it not equally true, if a will be made which is variant from the testator's determination, *entertained and expressed for years*, that this fact is admissible evidence against the capacity of the testator? If the *conformity* tend to establish the will, does not the *non-conformity* tend to impair its validity? Now, what stronger evidence could be offered, either of this *determination* or its *expression*, than the incorporation of such intention in a former will?

We have found no authorities which fully sustain this principle in Roberts v. Trawick, while the following adjudged cases hold such evidence admissible: Irish v. Smith, 8 Serg. & Rawle, 573; Love v. Johnston, 12 Ired. 355; Marsh v. Tyrrell, 2 Hagg. 84; Mynn v. Robinson, 2 Hagg. 169; Dodge v. Meech, 1 Hagg. 612.

The case of Stevens v. Vancleve, 4 Wash. C. C. R. 262, is the only authority cited by our predecessors in support of their ruling in the case of Roberts v. Trawick, *supra*. In that case, the question was not quite the same as that here presented. Moreover, the court in that case not only excluded the former will, but also the uniform declarations of the testator, which he had made in favor of the devisee under his will. We agree with that court, in holding that each species of this evidence stands on the same principle, and if one is excluded, the other should be. We think, however, that both should be admitted; and this court held in Roberts v. Trawick, *supra*, that former declarations of the testator were admissible.

We think our predecessors fell into error, in not discriminating between the admissibility and the sufficiency of evidence. It is certainly true, that a testator may change his mind: and the fact of such change will not, *per se*, avoid his will. He may give his property to a stranger, to the exclusion of his children. These circumstances, however, are proper evidence for the jury, on the issue whether the paper propounded is in fact the will of the supposed testator.—Coleman v. Robertson, 17 Ala. 84; Gilbert v. Gilbert, 22 Ala. 529; and see other authorities on the brief of counsel.

3. We think the evidence of the execution of a former will was, *prima facie*, sufficient to let it go before the jury. Whether it in fact was executed, would have been a question for them, under appropriate instructions. After its admission in evidence, the sufficiency of the proof should have been determined by the jury.—See 2 Cow. & Hill's Notes to Phil. Ev. (ed. of 1839,) pp. 1303, 1304; Ross v. Gould, 5 Greenl. 204; Pigott v. Holloway, 1 Binney, 436.

4. There was certainly no error in excluding that portion of the deposition of Nelly Evans which was objected

to. It assumed to detail a conversation between herself and other persons, relative to the testator. She did not testify that the information which she gave during that conversation was true, nor could she testify as to the truth of opinions advanced by others. All persons are legally accountable for their *acts*, and such acts may be the subject of proof. They can not be held accountable for the *opinions* which others may express of their conduct.

4. The charge of the court, to which exception was taken, is in substance the same as that considered in the case of Coleman v. Robertson, 17 Ala. 84. In that case, the charge was held to be free from error, and we do not feel at liberty to depart from the precedent then established. If the charge was calculated to mislead,—and we are inclined to think it was,—it was the duty of the party who thought himself injuriously affected by it, to ask explanatory charges.—Partridge v. Forsyth, 29 Ala. 200, and authorities cited. But, while an unequal distribution of property among children will not, as matter of law, avoid a will; yet it is a circumstance which the jury should weigh in pronouncing on the issue *devisavit vel non*.

For the error in refusing to receive evidence of the former will, the judgment of the probate court is reversed, and the cause remanded.

McKENZIE & SON *vs.* LAMPLEY.

[TRIAL OF RIGHT OF PROPERTY IN COTTON.]

1. *Lien of execution on growing crop.*—By the common law, which is now unaffected by statutory provisions in this State, (Code, § 2461; Session Acts 1853–54, p. 69,) an execution is a lien on a growing crop from the time of its delivery to the sheriff.

APPEAL from the Circuit Court of Barbour.
Tried before the Hon. S. D. HALE.

THIS was a trial of the right of property in a lot of cotton, between I. & J. M. Lampley, plaintiffs in execution against Thomas Sheppard, and the appellants as claimants. The plaintiffs' execution was placed in the hands of the sheriff on the 14th August, 1855, and was levied by him, in October of the same year, "on certain cotton then gathered and in the claimants' gin-house, which was grown by said Sheppard during the year 1855." The claimants derived title under a mortgage from said Sheppard, dated in September, 1855, "which was executed while said cotton was growing and ungathered;" the execution, *bona fides*, and due registration of which mortgage were admitted. The court charged the jury, "that the lien of plaintiffs' execution was superior to that of the claimants' mortgage, and that they must find for the plaintiffs if they believed the evidence." This charge, to which the claimants excepted, is the only matter assigned as error.

MARTIN, BALDWIN & SAYRE, for appellants.
PUGH & BULLOCK, *contra*.

RICE, C. J.—Whether the execution received by the sheriff on the 14th August, 1855, was, from the time he received it, a lien on the growing cotton of the debtor within the county, depends upon the question, whether at that time growing cotton was subject to levy and sale under a *fieri facias*.—Code, § 2456.

In 1821 an act was passed, which declared, that it should not be lawful for any sheriff, or other officer, to levy a writ of *fieri facias*, or other execution, on the planted crop of a debtor, or person against whom an execution might issue, until the crop was gathered.—Clay's Digest, 210, § 46. Our predecessors held, that under that act the lien of a *fieri facias* did not attach, as to a planted crop, until it was gathered.—Adams v. Tanner, 5 Ala. R. 740; Evans v. Lamar, 21 Ala. R. 333. The Code (by section 10) repealed the act of 1821; and, by section 2461, provided that a levy might be made upon a growing crop, when there was no other property of the defendant known to

the sheriff; but that no sale must be made thereof, until the crop was gathered. Section 2461 of the Code was repealed by the act of 7th February, 1854.—Pamphlet Acts of 1853–4, p. 69. Between the 7th February, 1854, and the day on which the *fieri facias* relied on here by the plaintiff was received by the sheriff, there was no statutory provision of force, protecting growing crops from levy and sale under *fieri facias*. We are, then, compelled to decide the question now under consideration by the common law.

By that law, the distinction was between those things which go to the executor, and those which go to the heir. The former might be seized and sold under a *fieri facias;* the latter could not. A growing crop of corn or cotton, or any vegetable, which is produced, not spontaneously by the earth, but by annual planting and the labor and expense of the occupier of land, goes to the executor, and not to the heir of tenant in fee-simple. It is considered an independent chattel, not going as the land, but in a different direction; and "such a growing crop may, under the common law, be seized under a *fieri facias*, issued against the owner of the inheritance, as his goods and chattels, even while they are annexed to the freehold." Evans v. Roberts, 5 Barn. & Cress. 829; 2 Tidd's Practice, (edition of 1856, by Fish,) 1001, 1002; Smith v. Tritt, 1 Dev. & Batt. 241, and the English authorities there cited; Shannon v. Jones, 12 Iredell, 206; Parham v. Thompson, 2 J. J. Marsh. 159; Craddock v. Riddlesbarger, 2 Dana, 205; Bank of Lansingburg v. Cary, 1 Barb. Sup. Ct. R. 542; Whipple v. Foot, 2 Johns. R. 418; Partwell v. Bissell, 17 *ib.* 128; Penhallow v. Dwight, 7 Mass. 34.

We regret the necessity imposed upon us of deciding the question as we are bound to decide it. But the legislature destroyed the protection to growing crops, which existed in this State for many years, by statute; and thus threw us back upon the common law, for the rule of decision in this case. The common law is clearly against the protection claimed for the growing crop of cotton. However unwise or hard we may think the law to be, we must carry it out. If we had the power to protect the growing

crop against the levy and sale under execution, we would protect it. But we have no such power; and we are constrained to hold, that the delivery of the *fieri faeias* to the sheriff gave to the plaintiff a lien upon the growing crop of cotton, and that there is no error in the charge of the court below.

Judgment affirmed.

WALKER *vs.* MOBILE MARINE DOCK AND MUTUAL INSURANCE COMPANY.

1. *Misjoinder of causes of action not available on error.*—Where the complaint shows a substantial cause of action, and no objection was interposed to it in the primary court, a misjoinder of causes of action is not available on error.
2. *Nor defective description of plaintiff.*—In an action brought by a corporation, the omission to aver its corporate existence in the complaint is not available on error, when the trial was had on the plea of the general issue, without objection to the sufficiency of the complaint.
3. *Nor misjoinder of defendants.*—In an action on a contract, against three defendants, who all pleaded the general issue, judgment on verdict having been rendered against two only, without objection on their part, they cannot reverse the judgment on error, although the statute (Code, § 2156) does not authorize a judgment for plaintiff in such case.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by the appellee, against Daniel Walker, Jacob B. Walker, and Edward F. Shields, as owners of the steamboat *Farmer*, to recover $232 21, due by open account, for work and labor done, and materials furnished said steamboat; and the further sum of $361, "premium of insurance due and payable from defendants to plaintiff, in respect of plaintiff's having underwritten a policy of insurance, on behalf of defendants, and for their account, and at their request, for the insurance of a large sum of money, to-wit, the sum of $5,000, on said

steamboat." The defendants interposed no objection to the complaint, but went to trial on the plea of the general issue. The jury returned a verdict for the defendant Shields, and against the others; and the court thereupon rendered judgment for the plaintiff, against the said Daniel and Jacob B. Walker, for the amount of damages assessed by the jury, with costs; and in favor of said Shields, for his costs.

The errors now assigned are specified in the opinion of the court.

GEO. N. STEWART, for the appellant.

P. HAMILTON, *contra.*

WALKER, J.—The appellants, being defendants, interposed no objection in the court below to the pleading, process, judgment, or any of the proceedings. They now seek to reverse the judgment, upon the following grounds: 1st, that the complaint was defective; 2d, that the competency of the plaintiff to sue does not appear in the complaint; 3d, that, while the complaint is upon contracts by three defendants, a verdict was had and judgment rendered against two, and in favor of one of the defendants; 4th, that there was a misjoinder of causes of action; and 5th, that the plaintiff recovered full costs.

1. It is unnecessary for us to decide, that the complaint would have been good on demurrer. It unquestionably contains a substantial cause of action; and that being the case, the judgment would not be reversed, although there might be a misjoinder of causes of action, or other defect, not amounting to the want of a substantial cause of action.—Code, § 2405; Stewart v. Goode & Ulrick, 29 Ala. 476; Blount v. McNeill, 29 Ala. 473. It is manifest, however, that there was no misjoinder of causes of action, whether the complaint is tested by the common law, or the Code.—1 Chitty on Pleading, 200; Code, § 2235.

2. Conceding that the complaint in this case was defective, in not averring that the plaintiff was a corporation, it is too late, when the case is before this court on appeal, to make the objection, where, as in this case, the defend-

ants pleaded, and pleaded only the general issue.—Prince & Garrett v. Commercial Bank of Columbus, 1 Ala. 241; Angell & Ames on Corporations, § 632.

3. Section 2156 of the Code says, that when a suit is instituted against several defendants, whether sued as partners or otherwise, the plaintiff may recover against one or more, but is liable for costs to those against whom he does not recover. This statute cannot mean, that a recovery can be had upon a contract, described in the complaint as made by two or more, when the proof shows that it was made by a less number. To so construe the statute, would authorize a recovery upon a cause of action not embraced in the pleading, and would virtually abrogate so much of section 2227 as requires "the presentation of the facts, or matter to be put in issue, in an intelligible form." The statute is not designed to create a right of recovery inconsistent with the complaint; but to authorize a judgment, where some of the defendants are discharged, upon grounds which do not show the absence of a right of recovery against the remaining defendants upon the pleading. The statute embraces all those cases where the plaintiff fails to recover against a part of the defendants, upon the plea of infancy, coverture, bankruptcy, or any other ground, which does not show that the cause of action is variant from the complaint. The appellants in this case might, with propriety, have asked the charge to the jury, that the plaintiff could not recover, unless the contract was made by all the defendants. But they did not ask this or any other charge. They suffered judgment to be rendered against them without an objection; and we think it is now too late for them to raise the question. Our law declares, that no judgment can be arrested, annulled, or set aside, for any matter not previously objected to, if the complaint contain a substantial cause of action.—Code, § 2405. The appellants made no objection to the return of a verdict against them alone, or to the rendition of judgment against them alone. For all that we can see, the verdict and judgment may have been consistent with their wishes at the time. The complaint contains a substantial cause of action. The appel-

lants are, as we think, within the letter and spirit of the law; and we cannot, consistently with it, reverse or set aside the judgment.

The assignment of error upon the ground that judgment was rendered against the appellants for all the costs, is not well taken in point of fact. Judgment was rendered against the plaintiff, for the costs of the defendant who was discharged.

The judgment of the court below is affirmed.

NALL & BROOKS *vs.* McINTYRE.

[ACTION BY PARTNERSHIP ON OPEN ACCOUNT.]

1. *Authority of partner to bind partnership.*—One partner cannot, without the consent of his co-partner, transfer a demand, which on its face shows that it belongs to the partnership, in payment of a debt which he and a third person owe, and for which the partnership is not bound; nor does such transfer estop the partnership from suing on the demand.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. S. D. HALE.

THIS action was brought by the appellants, as partners, against Edward L. McIntyre, and was founded on an open account. The justice of the peace before whom it was commenced rendered judgment for the plaintiffs, from which the defendant appealed to the circuit court, where the case was submitted to the decision of the judge, without the intervention of a jury, on the following agreed facts:

"In 1855 the plaintiffs were partners in trade, and during the partnership the account sued on was contracted by the defendant. The partnership was dissolved, on the —— day of ———, 1855, without public notice of the fact. After the dissolution, both parties were equally authorized to wind up the business of the firm. A. N. Worthy and

the defendant owned a horse and buggy in partnership, which they desired to sell. Brooks, one of the plaintiffs, and one Tompkins, being in partnership in the stable business, desired to purchase the horse and buggy; and Worthy, during the absence of the defendant, offered to contract with them for its sale. Brooks negotiated the trade with Worthy, and agreed to the purchase on the condition, that Worthy and defendant would receive payment in cash accounts against persons about Troy; mentioning, among others, the one sued on; to which Worthy assented, on condition that the defendant, when he got home, would ratify it. The defendant came home a few days afterwards, saw Worthy and Brooks together, and confirmed the trade; the horse and buggy being in the possession of Brooks & Thompson. At the time defendant confirmed the stipulations of the buggy trade, he had no notice of the dissolution of the firm of Nall & Brooks. There were outstanding demands against the firm of Nall & Brooks, which were unsatisfied; and Nall told Worthy, that he would not assent to the transfer of the account on the defendant to him and Worthy, in part payment of the horse and buggy—that the account against the defendant was due and owing to Nall & Brooks, and was not the property of Brooks; but whether this dissent was given before or after the confirmation of the trade by defendant, is not remembered. Worthy & McIntyre received the note of Brooks & Tompkins, before the ratification of the contract by defendant, for the full amount of the purchase-money for the horse and buggy, payable in good cash notes. The account against the defendant was not deducted from the amount of the purchase-money, nor was it credited on the note. There were, at the time the action was brought against the defendant, and still are, outstanding debts against the firm of Nall & Brooks. The defendant was not credited with any amount on the books of Nall & Brooks."

On these facts the court rendered judgment for the defendant; to which the plaintiffs excepted, and which they now assign as error.

H. W. Hilliard, for the appellant, cited Pierce & Baldwin v. Pass & Co., 1 Porter, 232; Fisher & Johnson v. Campbell, 9 Porter, 209; Lucas v. Atwood, 3 Stewart, 378; Burwell & Clarke v. Springfield, 15 Ala. 273; 3 U. S. Digest, pp. 91–2, §§ 51, 52.

Pugh & Bullock, *contra*, cited Lucas v. Bank of Darien, 2 Stewart, 280; White v. Toles & Dunlap, 7 Ala. 569.

STONE, J.—The agreed facts in this case raise two legal questions: 1st, can a single member of a partnership, without the consent of his co-partner, apply a partnership demand, which *on its face* shows that it belongs to *the firm* of which he is a member, in payment of a debt which he and a third person owe, and for which the firm is not liable; and, 2d, if such application of the partnership effects be made, does this estop the partners from suing as partners for the recovory of such demand. The following authorities answer both of these questions in the negative; Pierce v. Pass, 1 Por. 232; Cunningham v. Carpenter, 10 Ala. 109; Burwell v. Springfield, 15 Ala. 273; White v. Toles, 7 Ala. 567; Gram & Stewart v. Caldwell, 5 Cowen, 489; Everngheim v. Ensworth, 7 Wend. 326; Rogers v. Batchelor, 12 Peters, 221; Story on Partnership, §§ 132–3, and notes; Coll. on Partnership, (by Perkins,) §§ 483–4.

The case of Cochran & Estill v. Cunningham, rests on an entirely different principle. The *material* point consid ered in that case, is not necessarily in conflict with the principles aboved asserted. Estill had, by his conduct and agreement, induced Cunningham to part with his goods, in the purchase of the judgment on Thomas; and he thereby estopped himself from disputing Cunningham's right to the judgment. The authorities cited in support of that opinion are also reconcilable with our opinion in this case.—Cochran v. Cunninghim, 16 Ala. 448; Richmond v. Heapy, 1 Stark. 202; Riggs v. Lawrence, 3 T. R. 453; Jacaud v. French, 12 East, 317; Coll. on Part. (by Perkins,) § 468.

The judgment of the circuit court, being in conflict with the views above expressed, is here reversed, and the cause remanded.

SHIELDS *vs.* BURNS.

[APPLICATION FOR REHEARING AFTER FINAL JUDGMENT AT LAW.]

1. *Facts insufficient to authorize rehearing.*—A defendant, against whom a judgment by *nil dicit* has been rendered, cannot obtain a rehearing, (Code, § 2408,) on proof that he had employed an attorney to defend the suit for him, and informed him of his defense; that he did not attend the court in person, because his attorney advised him that it was unnecessary for him to do so, inasmuch as the cause must be continued; that his attorney, on the call of the docket, entered an appearance for him, and stated that he had a good defense; and that, when the cause was regularly reached for trial, his attorney was absent from the court-house, in consequence of unexpected business in which he was personally interested, and did not hear the call of his name.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. ROBT. DOUGHERTY.

IN this case, the appellee filed a petition, under section 2408 of the Code, to set aside a final judgment which had been rendered against him, at the last preceding term of said circuit court, in favor of the appellant. The cause was submitted the decision of the court, as appears from the bill of exceptions, on the following agreed facts: "At the term of the court at which said judgment was obtained, Burns had employed one D. S. Harbin, an attorney of said court, to defend the suit, and stated to him, as a defense, that a garnishment had been served on him, at the suit of Cowles, Woodruff & Co., as creditors of Johnson & Champion, the payees of the note on which said suit was founded, and the transferrors thereof to said Shields, the plaintiff, requiring him to answer at that term of the court as to his indebtedness, if any, to said Johnson

& Champion; and that he had been notified by said Shields, before the institution of said suit, that he was the owner of said note. Harbin, as attorney, informed Burns that these facts constituted a sufficient cause for continuing said suit on the note until the next term of the court, and advised him to go home. When said cause was reached, on the regular call of the docket for judgments, Harbin requested the court to enter his name as appearing for the defendant. The plaintiff's attorney asked him, what defense he had to make; and he replied, 'a good one,' and briefly alluded to the defense above stated; but nothing beyond this passed between the parties or their attorneys, in relation to the suit. On the following week, when the cause was regularly reached and called for trial, no one responded for the defendant, and judgment by *nil dicit* was thereupon rendered. Said Harbin was called by the court, as attorney for the defendant; but, being engaged outside of the court-house, on account of an unexpected affair to which his brother was a party, and in which he felt a deep interest, he did not hear the call. He felt satisfied that the cause would not be called in his absence, and fully intended to make the above showing for a continuance of it. There was, however, no agreement or understanding of any kind, between the parties or their attorneys, for a continuance, or for delay. The record of the garnishment suit shows that the garnishment was served on said Burns."

On these facts, the court set aside the judgment, and granted a rehearing of the original cause; to which the plaintiff therein excepted, and which he now assigns as error.

J. F. CLEMENTS, for the appellant.

No counsel appeared for the appellee.

RICE, C. J.—The application in this case was made within proper time; that is, "within four months from the rendition of the judgment." It was tried upon the "agreed facts" set forth in the bill of exceptions, and must be here tried upon them. Looking alone to them,

it is doubtful, to say the least of it, whether any court could say that the defendant was "prevented from making his defense, by surprise, accident, mistake, or fraud."—Crawford v. Clute, 7 Ala. R. 157; Crawford v. Slade, 9 *ib.* 887. But, conceding that he was so prevented; still that, of itself, is not sufficient to entitle him to a rehearing. He must, in addition to that, show that the prevention was "*without fault on his part.*"—White v. Ryan, at the present term, and authorities there cited. If he lost the opportunity of making his defense, by the neglect, inattention, or mistaken counsel of his own attorney, without any fraud or unfairness of the adverse party, it is, in law, *as between him and the adverse party*, the same thing as if he had lost it by his own neglect, inattention or fault. "For injuries resulting to clients, from negligence or inattention on the part of their attorneys, courts cannot give redress against the other party to the suit. Redress must be sought in a new action, against a new party."—Henck v. Todhunter, 7 Har. & Johns. 275; Kent v. Ricards, 3 Maryland Chancery Decisions, 392; Lawson v. Bettison, 7 Eng. (Arkansas) Rep. 401; Barrow v. Jones, 1 J. J. Marsh. 440.

The agreed facts do not show any sufficient excuse for the absence of the defendant and his attorney when the judgment complained of was rendered. As both of them were then absent, and no sufficient excuse is shown for the absence of both, we cannot say that one of them should not then have been present; nor can we say that the defendant was prevented from making his defense "without fault on his part." And as we cannot say he is without fault, we are bound to decide, that he is not entitled to a rehearing of the original cause.—See authorities cited *supra;* also, Yancey v. Downer, 5 Litt. Rep. 8; Paynter v. Evans, 7 B. Monroe, 40; Saunders v. Fisher, 11 Ala. R. 812.

As the case is presented by the agreed facts, we cannot know but that the defendant may have already answered as garnishee, and been discharged, or been put in a position of safety, as against the plaintiff in the garnishment. It does not even appear in the agreed facts, that the gar-

nishment was served upon him *before* this suit was commenced. It is clear, therefore, that the defendant is not entitled to have the judgment in the original cause set aside, and a rehearing granted. Whether he can show himself entitled to a stay of execution or other relief, under the decisions made in Crawford v. Clute, and Crawford v. Slade, *supra*, or under section 2406 of the Code, we can not decide in the existing state of the record.

The circuit court erred, in setting aside the judgment in the original cause, and in quashing the execution upon the agreed facts. Its judgment is, therefore, reversed, and the cause remanded.

BOYLSTON *vs.* SHERRAN.

[ACTION UNDER CODE FOR BREACH OF SPECIAL CONTRACT.]

1. *Variance*.—Under a complaint for the breach of a special contract, by which plaintiff agreed "to cut a canal, or ditch, three quarters of a mile long, twelve feet wide, and one and a half feet deep, more or less; the earth to be thrown on the east side of the ditch, making a dam or levee,"—a contract which binds him "to complete a canal, three quarters of a mile long, twelve feet wide, throwing the dirt on the east side, making a dam, or levee, one and a half feet deep, more or less; also, *to open the track*," is not admissible evidence on account of the variance.
2. *Plea of non est factum in action on lost note, bond, &c.*—In an action on a lost "bond, note, bill of exchange, or other mercantile instrument," (Code, § 2151,) the defendant may take advantage of a variance between the instrument declared on and that offered in evidence, without a sworn plea of *non est factum*.
3. *What constitutes complaint.*—A memorandum at the bottom of the complaint, not signed by either the parties or their attorneys, in these words, "Common counts added by consent," is not sufficient to show that the common counts were treated as a part of the complaint.
4. *Joinder of causes of action, and assignment of breach.*—In an action on a special contract for the payment of money by the defendant in consideration of work to be done by plaintiff, a special breach is not necessary; and if such breach be assigned, the common counts may nevertheless be added.

APPEAL from the Circuit Court of Barbour.
Tried before the Hon. JOHN E. MOORE.

THE complaint in this case was as follows:

"Michael Sherran, sr., Michael Sherran, jr., *vs.* Joseph C. Boylston. } The plaintiffs claim of the defendant $460, for the breach of an agreement, entered into by him on the 28th, June, 1854, in substance as follows: 'June 28th, 1854. Contract between Joseph C. Boylston on one part, and Michael Sherran of the other part: The said Sherran agrees to cut a canal, or ditch, three quarters of a mile long, twelve feet wide, one foot and a half deep, more or less; the earth to be thrown on the east side of the ditch, making a dam or levee. The said Joseph C. Boylston agrees to pay said Michael Sherran $460 when the job is completed. In witness whereof, we have hereunto set our hands and seals.' (Signed) 'Joseph C. Boylston, Michael Sherran, Michael Sherran.' Yet, although the plaintiff has complied with all its provisions on his part, the defendant has failed to comply with the following provisions thereof: he has failed and refused to pay the said plaintiffs the said sum of $460, according to his agreement, on the completion of said job of work. Plaintiffs claim interest on said sum of money, from the 20th May, 1855."

"SEALS & COX,"
"att'ys for pltffs."

At the bottom of this complaint, as copied into the transcript, is a memorandum in these words, "Common counts added by consent;" which is not signed by any one.

The action was commenced on the 15th September, 1855. Accompanying the complaint was an affidavit, made and subscribed by both of the plaintiffs on the 26th May, 1855, to the effect that the contract, as set out in the complaint, "is a copy of an original instrument which they had in their possession, as their property; that the same has been lost, and has not been paid or otherwise discharged; and that the said amount in the said instrument is still due to them." The only plea was the general issue, upon which issue was joined. On the trial, after reading their complaint and affidavit, the plaintiffs offered in evidence an admitted copy of the original con-

tract between them and the defendant, which was in these words:

"28th June, 1854. A contract between J. C. Boylston on the one part, and Michael Sherran on the other: The said Sherran agrees to complete a canal ¾ mile long, 12 feet wide; throwing the dirt on the east side, making a dam or levee 1½ feet deep, more or less; also, to open the track; for $460, to be paid by J. C. Boylston at the completion of said job. In witness whereof, we set our hands and seal." (Signed by the three parties.)

The defendant objected to the introduction of this contract, on the ground that it was variant from the contract declared on. The court overruled the objection, because the defendant had not interposed a sworn plea, denying the execution or contents of the instrument as set out in the complaint; to which the defendant excepted, and which he now assigns as error.

Pugh & Bullock, for the appellant.—1. There was a fatal variance between the contract declared on and that offered in evidence.—McLendon v. Godfrey, 3 Ala. 181; May & Bell v. Miller & Co., 27 Ala. 515; 4 Texas, 85; 9 N. H. 304; 12 N. H. 52.

2. There was but one count in the complaint. The record does not show that the common counts were added, nor could they have been added without making the complaint demurrable.

3. The instrument sued on is not within the terms of the statute (Code, § 2151) requiring a sworn plea of *non est factum;* nor would such plea have been necessary, even if the case were within the statute, to enable the defendant to take advantage of a variance.

Martin, Baldwin & Sayre, *contra*, contended,—1st, that there was no substantial variance between the contract set out in the complaint and that offered in evidence; 2d, that the contract was admissible under the common counts, if not under the special count; and, 3d, that a sworn plea was necessary, under section 2151 of the Code,

to enable the defendant to deny the execution or contents of the contract declared on.

WALKER, J.—The contract described in the complaint is *certainly* different from that given in evidence, in that the latter requires the plaintiffs "*to open the track*," and makes that one of the duties for the discharge of which the defendant was to pay four hundred and sixty dollars, while the former makes no such exaction. If by opening the track the parties meant cleaning off the ground where the ditch was to be dug, we can not say that the duty, required in the contract described, of *cutting the ditch*, included the cleaning off the ground, or opening the track. They are distinct acts, and the parties might well contract for the performance of both acts. The contract described, therefore, omitted one of the terms contained in the contract given in evidence, and the latter was variant from the former.

2. It is manifest that section 2151 of the Code is designed to create a presumption of "*the loss, destruction and contents*" of the written instrument described in the complaint, and not of another and different instrument. The court could not, under that statute, allow a recovery upon a different contract from that described, because the plaintiffs had made an affidavit, which accompanied the complaint, "*of the loss, destruction and contents*" of the instrument sued upon.

3. The common counts are not a part of the complaint. They are not mentioned, except in a memorandum, following the complaint in the transcript, in the following words: "Common counts added by consent." These words are not signed by the parties, or counsel; and there is nothing in the record which will authorize us to infer that they were by consent regarded as standing in the place of the common counts, or that they were treated as indicating in any manner a part of the complaint. Strange v. Powell, 15 Ala. 452. We can not look to those words, in determining what was the complaint; and are constrained to hold, that it contains only the special count.

The evidence, being inadmissible under the only count in the complaint, should have been excluded; and for the error in admitting it, the judgment must be reversed, and the cause remanded.

4. The contract on the part of the defendant was for the payment of money by him, and was not one upon which it was necessary to assign a special breach. Therefore, section 2235 is not in the way of a joinder of the common counts with the count on the contract. It will be competent, on the return of the cause to the circuit court, for the complainant, with the permission of the court, to amend the complaint, so as to make the special count correspond with the facts; and also, if desired, to add the appropriate common counts.

The judgment is reversed, and the cause remanded.

INTENDANT AND TOWN COUNCIL OF LIVINGSTON *vs.* PIPPIN.

[ACTION AGAINST MUNICIPAL CORPORATION ON SPECIAL CONTRACT.]

1. *Powers of corporate authorities of Livingston to procure water.*—The corporate authorities of the town of Livingston, under their charter and the act amendatory thereof, (Session Acts 1834-5, p. 133; *Ib.* 1839-40, p. 123,) have power to procure a supply of water on the public square of the town, and are themselves the judges of the mode and manner best calculated to accomplish that object.
2. *What defenses corporation may set up in avoidance of contract.*—In an action against a municipal corporation, to recover the price agreed to be paid for the boring of an artesian well, the defense cannot be set up that, though the corporate authorities had power to contract for the procuring of a supply of water on the public square of the town, they ought to have adopted some less expensive means of procuring it.
3. *Joinder of causes of action, and assignment of breaches.*—In an action on a special contract, to recover the agreed price for work done, it is not necessary to assign a special breach; and if such breach be assigned, the common counts may nevertheless be added.—Code, § 2235.
4. *Plea must go as far as it professes.*—A plea which, while professing to answer the whole action, answers a part only, is fatally defective on demurrer.

APPEAL from the Circuit Court of Sumter.
Tried before the Hon. JOHN E. MOORE.

THIS action was brought by Littleberry Pippin, against the appellants, and was founded on the defendants' breach of a contract, which, as set out in the first count of the complaint, was in these words:

"This agreement, made and entered into by and between the intendant and town council of the town of Livingston, of the one part, and Littleberry Pippin, of the other part, witnesseth, that the said corporation has this day hired of the said Pippin his negro boy Hardy, for the purpose of boring, within the corporate limits of said town, a well, commonly called an artesian well; which said boy the said Pippin guaranties to be competent and skillful in the prosecution of works of that kind. The said corporation agrees to pay said Pippin, for the services of said boy, at the rate of $100 per month, payable monthly, and to furnish him with food and lodging only; reserving the right to dismiss said boy from their employment at the expiration of any month, and to make deduction for sickness or absence of said boy. The said Pippin, on his part, agrees to furnish all the tools, implements and apparatus that are or may be necessary for the boring and completion of said well; but the said corporation agrees to keep the tools and implements in good order and repair for the prosecution of said work.

"Signed in behalf of the intendant and town council of the town of Livingston, this 13th December, 1854.

"H. H. HARRIS, Int."

The first count in the complaint was as follows:

"The plaintiff claims of the intendant and town council of Livingston, viz.," (setting out their names,) "$3,500, due by account on the 1st day of April, 1857, for work and labor done under the following contract, entered into by him with the said corporation, to-wit: (setting out the contract above copied.) "And plaintiff avers, that he has rendered work and labor in full compliance with his part of said contract, to-wit, from the 13th December, 1854, to the 1st April, 1857; but that said defendants have

failed to perform their part of said contract, and, although often requested, have failed and refused to pay plaintiff the said $100 per month, payable monthly, or any part thereof; to the damage of plaintiff of said sum of $3,500, with interest thereon. Wherefore he brings this suit."

The other counts were, substantially, as follows: The second claimed "the further sum of $3,500, due the 1st April, 1857, for work and labor before that time done by plaintiff, for said corporation, and at its special instance and request, with interest thereon." The third claimed "the further sum of $3,500, due on the 1st April, 1857, for the hire of negro man Hardy, belonging to plaintiff, from the 13th December, 1854, to the 1st April, 1857, at the rate of $100 per month, payable monthly, at the special instance and request of said corporation, with interest thereon." The fourth claimed "the further sum of $3,500, due on the 1st April, 1857, for the hire of negro man Hardy from the 13th December, 1854, to the 1st April, 1857, with interest thereon." The fifth claimed "the further sum of $3,500, due on the 1st April, 1857, for work and labor done, and materials furnished for the same by plaintiff, for said corporation, and at its instance and request, from the 13th December, 1854, to the 1st April, 1857, at the rate of $100 per month, payable monthly, with interest thereon."

The defendants demurred to the entire complaint, on the ground that there was a misjoinder of counts, in uniting a count on a contract requiring a special breach with counts on contracts which did not require such special breach; and to the first count separately, on the following grounds: 1st, "because plaintiff sues to recover the amount due by contract for work and labor done, when he avers that it was done under a special contract;" 2d, "because plaintiff predicates his right to recover on a special contract, but does not aver or show that the contract was ever made, signed or executed by the defendant, or any one authorized to execute the same on its behalf;" 3d, "because plaintiff does not show that the contract set out is the contract of the defendant;" 4th, "because plaintiff does not aver or show that the defendant is a

corporation capable of making a contract, or of suing or being sued;" 5th, "because the contract set out in said first count shows on its face that it is not such a contract as the defendant, under its charter, is competent, or has the legal authority, capacity, or power to make;" and, 6th, "because there is no sufficient averment in the complaint that plaintiff has performed his part of said agreement."

The court overruled these demurrers, and the defendants then filed eight pleas, of which it is only necessary to notice the 4th, 6th, 7th, and 8th, which were in these words:

"4. And for further plea in this behalf, said defendants say, that said plaintiff, during two months of the time for which he claims compensation from the defendants for the services of his negro boy Hardy, at the rate of $100 per month, interfered with said boy Hardy, in the prosecution of said work, and took him under his (plaintiff's) own management and control; and so unskillfully prosecuted, managed, conducted and controlled said work, for and during the time of said two months, that no progress whatever was made therein, and the whole of said two months was entirely lost to defendants.

"6. And for further plea in this behalf, defendants say that plaintiff ought not to have or maintain his aforesaid action against them, because they say, that they are a body corporate, by an act of the general assembly of the State of Alabama, approved on the 10th January, 1835, which said act of incorporation is in the words and figures following," (the act referred to is not set out;) "and by an act to repeal in part the said act of incorporation, approved on the 31st January, 1840, in the words and figures following," (the act is omitted;) "by which said acts of the general assembly the said defendants were created a body corporate with limited and defined powers and jurisdiction. And the defendants aver, that the contract, alleged by the plaintiff to have been entered into by and between him and said defendants, was for boring an artesian well upon the public square in the town of Livingston; and that the work and labor, for which com-

pensation is claimed in all the counts of plaintiff's complaint, is work and labor alleged by said plaintiff to have been done by him on said artesian well; and that said well was not necessary for the security and welfare of the inhabitants of said town, or for preserving the health, peace, order or good government within said town. And said defendants say, that the said corporation, so created as aforesaid, is in no way, by either of said acts of the general assembly, authorized or empowered to enter into any contract with said plaintiff, for the boring of an artesian well on said public square, as said plaintiff, in his said complaint, has alleged against them; and so said defendants say, that the said contract, not being authorized by their charter of incorporation, is of no force or effect whatever against them, and this they are ready to verify."

The 7th plea, after alleging the incorporation of the defendants as a body corporate, as in the 6th plea, proceeded as follows: "And defendants aver, that said corporation, so created as aforesaid, is in no way authorized or empowered, by either of said acts of the general assembly, to enter into any such contract with said plaintiff, for any such purpose as said plaintiff, in his said complaint, hath alleged against them; and so said defendants say, that the said contract, not being authorized by their charter of incorporation, is of no force or effect whatever against them," &c.

The 8th plea averred, "that the work and labor, specified in plaintiff's said complaint, was to be performed under a contract between plaintiff and said defendants, for the boring of an artesian well on the public square of said town; and that the same was an entire contract; and that the plaintiff abandoned said contract before the completion of said well, without the consent of said defendants, whereby said well became wholly valueless to said defendants."

The plaintiff demurred to these pleas, on the following grounds: to the 4th, "because it is only a plea in mitigation of damages," "because it does not present any bar to the action," "because it does not begin or conclude

as a plea in bar," and "because it sets up a cause of action against the plaintiff which cannot be set off, nor the damages recouped in this action;" to the 6th and 7th, "because neither presents any bar to the action," "because neither shows any want of authority to make the contract declared on," "because each shows a state of facts which the defendant is estopped from pleading," "because each alleges a state of facts which contradicts or varies the written contract declared on," and "because each, in effect, denies the execution of the contract declared on, and is not sworn to;" and to the 8th, "because it does not present any bar to the action, although it purports to be a plea in bar," "because it is double," "because it is only a plea in mitigation of damages," and "because it contradicts the written contract declared on." Each of these demurrers was sustained.

The rulings of the court on the pleadings are now assigned as error.

S. F. Hale, for appellants.—1. The demurrer to the entire complaint should have been sustained, on account of the misjoinder of counts. The contract declared on required a special breach, and, consequently, could not be joined with the common counts.—Code, § 2235.

2. The demurrer to the first count, and to the 6th and 7th pleas, presents the question, whether the corporate authorities of the town had power to make a contract for the boring of an artesian well on the public square. A corporation has only such powers as are expressly given by its charter, and such as are necessary to carry those express powers into effect; and can make no contract which is not within the scope of these powers.—*Ex parte* Burnett, 30 Ala. 461; 13 Mass. 272; 13 Peters, 519, 587; Angell & Ames on Corporations, 200; 1 Stewart, 306; 1 McLean, 41. Neither the original charter, nor the act amendatory thereof, gives the power which has been exercised. The latter act, on the contrary, only authorizes the levy of a tax sufficient to defray the "ordinary expenses" of the corporation. The boring of an artesian well cannot be considered a part of the "ordinary

expenses" of a little municipal town. It would be preposterous to allow the existence of a power to make such contract, when the corporation has no power to levy a tax to meet the indebtedness thereby incurred.

3. The corporation is not estopped from setting up its own want of authority, in avoidance of the contract. 8 Gill & J. 285; 1 Maryland Ch. Dec. 413, 550; 5 Conn. 561; 2 Cranch, 168; 4 Ala. 558; 2 Denio, 110; 7 Wend. 34.

4. The party who violates an entire contract cannot recover, either on the contract itself, or for work and labor done. The 8th plea was, therefore, good.

A. A. Coleman, and Turner Reavis, *contra*.—1. There was no misjoinder of counts. The special contract, having been executed by plaintiff, required no special assignment of a breach in the non-payment of the money. Sprague v. Morgan, 7 Ala. 592.

2. The 7th section of the charter of the town of Livingston gives the corporate authorities implied (if not express) power to furnish the inhabitants with a supply of water.—7 Ohio, 354; 11 Missouri, 61; 5 Jacob's Law Dictionary, p. 187, tit. *Police*.

3. The contract having been executed by plaintiff, the defendants cannot set up its invalidity, after having received its benefits.—7 Ohio, 354; 2 Harr. (Penn. St.) R. 83; 16 Mass. 102; 1 Rich. (S. C.) R. 281.

4. The 4th plea is bad, because (aside from other reasons) it professes to answer the whole action, while it answers only a part.—17 Ala. 109; 19 Ala. 734; 27 Ala. 208; 27 Ala. 562; 29 Ala. 668; 13 Wend. 78; 20 Johns. 204.

STONE, J.—The provisions of the act incorporating the town of Livingston, which confer on the intendant and council their chief powers—those which bear on the questions presented by this record—are found in section 7 of that act, and are as follows:

"Section 7. The intendant and council shall have power to pass all such orders, by-laws and ordinances, respecting the street or streets, market-buildings, pleasure

carriages, wagons, carts, drays and *police of said town*, that shall be necessary for the *security and welfare of the inhabitants thereof*, and for *preserving health, peace*, order and good government within the said town; and to assess a tax on the inhabitants thereof, not exceeding one third the amount of the State tax which is paid for property of the same kind; * * * * to affix fines against persons violating their by-laws or ordinances, not exceeding twenty dollars for each offense; * * * to assess a tax on licenses to retailers of spirituous liquors, and billiard-tables kept for use in said town, not exceeding on the former ten dollars, and on the latter fifty dollars in any one year."—Pamph. Acts 1834–5, p. 133.

There was an amendment of this act of incorporation, approved January 31, 1840, which declares, that "so much of the above recited act, as fixes the amount of taxes to be raised at one third the State tax, be, and the same is hereby, repealed." This act further provided, "That the intendant and council shall have power to lay and collect a tax on real estate, negroes and other property, sufficient to defray the ordinary expenses of said corporation: *Provided*, they shall, in no one year, lay and collect more than three times the amount of the now county tax, together with such poll tax as the intendant and council may deem proper."—Pamph. Acts 1839–40, p. 123.

It is contended that the act of 1840 is restrictive of the powers conferred by the original act of incorporation; that, conceding the corporate authorities, under the former act, had power to sink an artesian well, yet the latter statute takes away that power; that it can not be supposed the legislature contemplated that the intendant and council should incur a debt, which, under their power to levy taxes, they could not pay; that they have no authority to levy taxes, except to pay the *ordinary expenses* of said corporation; and that the expenses of an artesian well can not be classed as ordinary.

The solution of this question depends on the proper construction of the words, "ordinary expenses."

It is well settled, that corporations, which owe their

existence to the act of the legislature which called them into being, can only exercise the *powers which are expressly granted* to them, such *implied powers* as are necessary and proper to carry into effect the powers expressly granted, and such *incidental powers* as pertain to the purposes for which the corporation was created.—See Central Plank Road Co. v. Mayor and Aldermen of the City of Montgomery, at last term; *Ex parte* Burnett, 30 Ala. 461; Angell & Ames on Corp. (5th ed.) §§ 110, 111, 112.

These implied and incidental powers are unwritten, and vary with the varying objects of the corporation. They may be, and frequently are, abridged and restricted by the express language of the act of incorporation; and, when so abridged or restricted, the positive language prevails over the implications and incidents.

Ordinary expenses are the expenditures which are necessary to carry into effect the ordinary powers of the corporation. These terms are used in contradistinction to *extraordinary expenses*, which would be a necessary means of carrying into effect *extraordinary powers*. Under the rule above laid down, the implied and incidental powers of corporations must be classed as ordinary powers, because they pertain to all corporations, unless they are taken away by legislation. Under the same rule, it is only powers expressly granted that can properly be styled extraordinary; and hence, extraordinary expenses are those which are incurred in carrying into effect *express* and *extraordinary powers*. These principles result necessarily from the rules universally observed in construing the powers of corporations.

Looking into the act incorporating the intendant and council of the town of Livingston, we find no express grant of power which can properly be classed as extraordinary. Hence we hold, that the words "ordinary expenses," found in the act of 1840, have no field to operate on, and are simply supererogatory.

The intendant and council of the town of Livingston have the ordinary public powers which are conferred on municipal corporations. The express grants of power are copied in the opening of this opinion. Nothing is more

important, as a sanitary and police regulation, than an abundant supply of water. Its uses are too well known to require notice here. We hold, that the corporate authorities had the power, as such, to procure water on the public square of the town of Livingston.

If it be contended, that the intendant and council should not have incurred the expense of an artesian well, but should have contented themselves with the cheaper modes of accomplishing the object, we answer, that this question can not be raised in this form. The corporate authorities, having the power to procure the supply of water, were themselves the judges of the *mode* and *manner* best calculated to accomplish that object.—[Lawless v. Reese, 4 Bibb 307.] The propriety of their election, and the binding efficacy of their contract, can not be questioned collaterally. If their proposed expenditure was an abuse of their powers, any of the corporators had an ample remedy by injunction.—See Christopher v. Mayor of New York, 13 Barb. Sup. Ct. 567, and authorities cited. It needs no argument to vindicate the superior claims of this mode of redress, over the defense attempted in this case. See authorities cited in Smith v. Prattville Manufacturing Co., at last term.

It is contended, that the defendant's demurrer should have been sustained, because there is a misjoinder of counts in the complaint. This objection rests on section 2235 of the Code, which declares, "that a contract upon which it is necessary to assign a special breach can not be united in the same complaint with a contract on which no such breach is necessary." We think it a full and sufficient answer to this objection, that a suit on this contract, to recover for work and labor done under it, not only does not require a special breach, but in fact does not require a special count. When a contract, though special, is executed by one party, and nothing remains to be done but a payment of money, a recovery may be had on the common counts.—See Vincent v. Rogers, at last term, and authorities cited.

It is further objected, that the complaint does not aver that the contract declared on was executed by any person

or persons authorized to bind the corporation. We do not think this objection is sustained by the record.

The demurrer to the fourth plea was properly sustained, because that plea assumed to answer the whole complaint, when, in fact, it answered but a part of it.—Standefer v. White, 9 Ala. 527.

The other questions presented by this record are believed to be covered by the principles of this opinion.

There is no error in the record, and the judgment of the circuit court is affirmed.

POWELL *vs.* SAMMONS & DOTES.

[ATTACHMENT AND GARNISHMENT.]

1. *What demands may be subjected by garnishment.*—The only money demands which can be reached by process of garnishment are those which, from their nature, the debtor himself might recover in debt or *indebitatus* assumpsit.
2. *What defenses garnishees may make.*—A garnishee is entitled to retain for any debt which he shows to be due to him from the defendant in the original suit, and to recoup for any damages arising out of the contract or transaction in respect to which the plaintiff in the garnishment seeks to hold him liable.
3. *Constitutionality of act of* 1854 *providing summary remedy against plank-road companies.*—The act of Feb. 17, 1854, (Sess. Acts 1853-4, p. 51,) authorizing the toll-gates of any plank-road company to be thrown open, on the report of commissioners appointed by the probate court that such road was out of repair, is, as to the Central Plank-Road Company, unconstitutional and void, because it impairs the obligation of the contract between the company and the State, and takes away the vested franchise of the company without compensation, without trial by jury, and without due process of law.
4. *Contract not avoided by unauthorized act of third person.*—The act of commissioners, under an unconstitutional statute, in throwing open the toll-gates of an incorporated plank-road company, does not affect the rights or liabilities growing out of a contract between the company and a mail-contractor for the passage of stages over the road: the company is still bound to keep its road in repair, and the mail-contractor equally bound to pay the stipulated price for the use of the road.
5. *Breach and rescission of contract.*—A breach of contract on the part of a plank-road company, in obstructing or hindering the stages of a mail-con-

tractor while running on the road, gives the party thereby injured a right either to abandon the contract, or to treat it as still subsisting and claim damages for the breach.

6. *Abandonment of road by plank-road company.*—If an incorporated plank-road company abandons its road, leaving its gates open, and keeping no agent at them to receive or demand toll, it cannot charge a person, as on an implied contract, for his use of the road during the continuance of such abandonment.

7. *Construction of charter of plank-road company as to right to charge toll.*—Where the charter of a plank-road company confers on it, in general terms, without any restrictive words, a right to charge toll for the use of its road, this does not, *it seems*, authorize it to charge unreasonable tolls.

APPEAL from the Circuit Court of Coosa.
Tried before the Hon. ROBERT DOUGHERTY.

THE appellant was summoned by process of garnishment, at the suit of the appellees, as the debtor of the Central Plank-Road Company, and answered in open court as follows:

"That he had a contract with said Central Plank-Road Company, by the terms of which he was to pay $20 per mile, *per annum*, for running his stages over the road of said company. When that contract went into effect, sixty-five miles of the road were completed. He paid the company, to the 1st August, 1853, all they claimed he owed them. From the 1st August to the 24th December, 1853, he was indebted, if the company had complied with their contract; during that time he paid nothing. He had the use of the road from 1st August to 24th December, 1853, except on the 1st, 2d and 3d days of August, when he was interrupted by the company, and was prevented from traveling the road with his stages. Said contract with the company was to extend to the 1st July, 1854. He used the road from the 24th December, 1853, to the 1st July, 1854, except such parts of it as could not be used. He remembered but two places where the road could not be used, but was informed of many others. From the 1st July, 1854, to the present time, Powell & Taylor used the road for running stages; but, for two months of this time, they used it in the name of Wilkins. On the 2d March, 1854, the gates on the road were thrown open by operation of law. From the 24th December,

1853, to the 2d March, 1854, he used the road; but he denies that he is liable to pay for the same, either under said contract or otherwise. From the 2d March to the 1st July, 1854, he used such portions of the road as could be used; but he denies that he is liable to pay for it, either under the contract or otherwise, the gates having been thrown open by operation of law, by order of the commissioners under an act of the last legislature. From the 1st August to the 24th December, 1853, he claimed the right to use the road under said contract; but he neither admits nor denies that he owes anything for it. From the 1st July, 1854, up to the present time, Powell & Taylor used the road, but not under any contract with said company or any other person. He denies that he owes anything for using the road from the 1st July, 1854, to the present time; because the road had been thrown open to the use of the public, by commissioners under an act of the legislature. The money for running the road was, under the contract, to be due annually; the first annual payment to be made on the 1st July, 1853, and the second on the 1st July, 1854. He settled up with the company to the 1st August, 1853, and paid about $100 (the amount not recollected) under protest. This was a charge for crossing two bridges, for crossing which he was not liable to pay anything; and he claims this as a set-off.

"Garnishee, further answering, says that, after being prevented from running the road with his stages on the 1st, 2d and 3d August, he filed a bill in chancery against said company, for an injunction, and sued out a writ of injunction, after giving bond with the usual conditions in such cases. Said bill was not filed to enforce a specific performance of the contract; it is still pending, but the injunction dissolved. He claims $300 from the company for the non-compliance with the contract on their part. He has been informed that the plank-road was sold on the 1st May, 1854. The company abandoned the road from and after the 2d March, 1854; the gates were opened, and the company had no agent on the road to receive or claim toll, and no toll was demanded up to this time. When

the contract was made, the road was in good repair, but is now in bad condition. Injury 25 per cent. on that account on the value of the use of the road from the 1st July, 1854, and 10 per cent. for six or eight months preceding that time. The validity of said contract is in issue in said chancery suit; the company denying its validity, and garnishee insisting that it is valid and binding. Wilkins used the road for two months; but Powell & Taylor made no contract with him to assume any liabilities for any trespass committed, or damages done by him to said road. The contract speaks of annual settlements only, and nothing is said in it about bridges; except as to a bridge over the Tallapoosa river, for crossing which he was to pay when it was built. This bridge was on the Montgomery and Wetumpka plank-road, which was embraced in the same contract with the Central plank-road. He claims under the contract the right to use the entire length of the road, without any extra charge for crossing bridges, except said bridge that was to be erected over the Tallapoosa river; and was to pay, to the Montgomery and Wetumpka Plank-Road Company, about $100 *per annum*, ferriage across said river. He was interrupted in crossing said ferry by the ferry-man, under the direction, as he said, of John G. Winter, the president of the Central Plank-Road Company, and was required to pay toll before his stages were permitted to cross the ferry. This was in the latter part of the fall or winter, 1853. Again, in March, 1854, he was required to pay toll at said ferry by the same authority, and was thereby forced to quit [crossing] in said ferry. There was no toll-gate at any one of the bridges on said Central plank-road, nor was any toll ever demanded of him at any of said bridges. The Central Plank-Road Company never interrupted him at said ferry on the Tallapoosa river, except John G. Winter, its president. At the time of the alleged violation of said contract, John G. Winter, claiming to act as the agent of the Central Plank-Road Company, demanded of garnishee $12,000 or $13,000 *per annum* for 90 miles of road, and at another time demanded 25 cents per mile for each time his stages passed the road. He received a notice from

John G. Winter, acting as agent for the company, stating that they would charge him for the use of the road; but he disregarded said notice, claiming the right to travel the road under said contract. The road was worth $20 per mile, subject to a deduction of 25 per cent. on the value of the use of the road, from the 15th January, 1854, up to this time; and for six or eight months prior to the 15th January, 1854, he claims a deduction of 10 per cent., for the bad condition of the road. The balance of the time the road was worth $20 per mile."

This answer being contested by the plaintiffs, an issue was made up between the parties; but at the next term, as appears from the bill of exceptions, "the court withdrew the cause from the jury, and proceeded to render judgment against the garnishee on his answer" for $1332 63; to which the garnishee excepted, and which he now assigns as error.

Wm. P. Chilton, and Morgan & Martin, for the appellant, made the following points:

1. On motion for judgment on the answer, the answer must taken as true; and judgment cannot be rendered against the garnishee, unless the answer admits an indebtedness which the debtor himself might recover in debt or *indebitatus* assumpsit.

2. The demand in favor of the Central Plank-Road Company, disclosed by the answer, is not of such a nature as can be reached by process of garnisment.—Nesbitt v. Ware & McClanahan, 30 Ala. 68, and authorities cited.

3. The answer discloses a breach of contract on the part of the company, and that the garnishee only got possession of the road by virtue of an injunction bond, on which he is still liable. The company could not, under these circumstances, proceed to judgment against the garnishee, either upon the express contract, or upon an implied promise, until the determination of the injunction suit.

4. The abandonment of the road by the company, as alleged in the answer, no matter for what cause, threw the

road open to the public. The charter only authorized the company to charge toll when its road was kept in repair, and toll-gates established.

5. The act of 1854, under which the road was thrown open by the commissioners, is not obnoxious to any of the constitutional objections urged against it. The company was bound by its charter to keep the road in repair, "so as to afford a safe and convenient transit for persons or freight;" and yet the charter prescribed no remedy to be pursued, either by the State or an injured party, for a neglect of this duty. The act of 1854 only supplied this omission, and provided a summary remedy to enforce the duty undertaken by the company. This act does not affect the charter of the company, or any of its vested rights; nor does it impose any new duty or liability on it. It is analogous to a statute giving a summary remedy for the enforcement of an existing contract. The charter does not authorize the company to receive tolls when it fails to keep its road in repair; and there is nothing in the charter which could preclude the legislature from prescribing the mode of ascertaining when the road is out of repair. In support of these propositions, see the following analogous cases: 6 How. (U. S.) Rep. 507; 2 Ala. 452; 5 Cranch, 281; 10 Wheaton, 246; 6 Peters, 404; 8 Peters, 88; 2 Sandf. 355; 11 Ohio, 112; 16 How. (U. S.) Rep. 406; 9 Ala. 236.

L. E. Parsons, *contra*.—1. The charter of the company conferred on it unlimited powers as to tolls.

2. This charter was accepted by the company, and large sums of money were expended on the faith of it. It thus became a contract, which the legislature could not, without the consent of the stockholders, violate or impair. 4 Peters, 514; 4 Wheaton, 537; 34 Maine, 415; 13 Iredell, 75; 10 Geo. 190; 2 Stewart, 30; 3 Cl. & Fin. 513, 521; 14 Barbour, 405; 27 Miss. 517; 13 B. Monroe, 150; 13 Vermont, 402, 525; 11 N. H. 19; 23 Ala. 68.

3. The act referred to in the answer of the garnishee, under which the gates of the company were thrown open, is unconstitutional and void, in that it attempts to take

away the vested rights of the company, without a trial by jury, without a judicial investigation, and without due process of law.—34 Maine, 247; 3 Mass. 146; 3 Pick. 343; 17 Johns. 195; 2 John. Ch. 162; 8 Sm. & Mar. 9; 15 Barbour, 517; 3 How. (Miss.) 240.

4. The answer admits an indebtedness sufficient to support the judgment, outside of the matters covered by the legal questions involved.

RICE, C. J.—It is settled, that a judgment for a sum of money cannot be rendered on the answer of a garnishee, against him, unless there is a distinct admission of a legal debt, either due, or to become due, by him to the defendant in the original suit, (Price v. Thomason, 11 Ala. R. 875; Mims v. Parker, 1 Ala. R. 421;) and that the only moneyed demands which can be reached by garnishment, are those which are of such a nature, that they might be recovered in an action of *debt* or *indebitatus assumpsit*.—Hall v. Magee, 27 Ala. R. 414; Nesbitt v. Ware & McClanahan, 30 Ala. R. 68; Mims v. Parker, *supra*.

It is also settled, that the garnishee may retain for any debt which he shows to be due to himself from the defendant in the original suit, or for any damages which he may show himself entitled to recover out of him, and which arise out of the same transaction or contract in respect to which the plaintiff in garnishment is seeking to make the garnishee liable. In respect to such debts or damages, the garnishee may protect himself to the same extent as he might if the suit was, in fact, a suit against him in the name of the defendant in the original suit. Hazard v. Franklin, 2 Ala. R. 349, and cases cited *supra;* Bingham v. Rushing, 5 Ala. R. 403; Reps. of Thomas v. Hopper, *ib.* 442. A resort to the remedy of garnishment cannot deprive the garnishee of the benefit of *recoupment*, or of any like defense.—Faxon v. Mansfield, 2 Mass. Rep. 147; Peden v. Moore, 1 Stew. & Por. 71.

By the charter granted to the Central Plank-Road Company, by the legislature of this State, on the 30th January, 1850, (Pamph. Acts of 1849–50, pp. 268–272,) the company was invested with all the rights and powers

necessary or required for the construction, continuation and keeping up a plank-road from Wetumpka to Gunter's Landing, or such other eligible point or place on the Tennessee river as might be selected. The president and directors of the company were authorized by the charter "to agree upon and fix the rate of toll to be collected and received of any person or persons" who might travel on or use the said road, and to cause to be erected upon said road "*suitable gates for the detention of persons passing thereon until the toll required*" *had been paid.* In the act of incorporation there was no clause reserving to the legislature the power to destroy by any subsequent statute any right legally vested in the company by its charter.

An act was passed at the session of the legislature of 1853–4, (Pamph. Acts of 1853–4, pp. 51–53,) the first four sections of which are, in substance, as follows:

SEC. 1. "That, from and after the passage of this act, it shall be the duty of the judge of probate of each county in this State, through or into which any plank, macadamized or turnpike road may run, to appoint three discreet freeholders of the proper county, commissioners, who shall hold their offices for one year, and until their successors are appointed, and shall perform the duties hereinafter specified.

SEC. 2. "That upon the application of any two freeholders or householders, any two of said commissioners shall proceed to examine the condition of any plank, macadamized or turnpike road within their county; and if, upon such examination, it shall appear to said commissioners that any such road is out of repair, so as not to afford a safe and convenient transit for persons or freight over such road, it shall be their duty to throw open the toll-gates of such road, and, without delay, make return of such examination and action thereon, under oath, to the judge of probate of the proper county.

SEC. 3. "That whenever any proprietor or authorized agent of any road, which has been examined and declared out of repair, as provided for in this act, shall make application to such commissioners for that purpose, said commissioners, or any two of them, shall proceed to examine

any such road as has been reported out of repair; and if, upon such examination, such road shall be found in proper order and repair, they shall forthwith report that fact to the judge of probate, under oath; and as soon as such return shall be made by the commissioners, the proprietor or authorized agent of any such road shall be authorized to receive toll, as before, for passing over such road.

SEC. 4. "That if any gate-keepers, or other persons, after any such road is declared out of repair, as provided for in this act, and before the same has been examined and reported upon by the commissioners, shall charge or receive any toll from any person for passing over or upon such road, or upon any freight or produce carried over or upon such road, such gate-keeper or other person receiving or charging such toll shall be liable for five times the amount of such toll, and costs, to be recovered before any justice of the peace of the proper county; and in any such suit the plaintiff shall be a competent witness."

Under color of these sections of the act of 1853–4, the gates of the company, erected and used for the detention of persons passing on the plank road until the toll required had been paid, were thrown open. This throwing open of the gates is one of the facts or matters stated and relied on in the answer of the garnishee; and thus it becomes our duty to pass upon the constitutionality of those sections.

The legislative charter to the Central Plank-Road Company was accepted, and the company organized under it. It is a contract within the meaning of the constitution of the United States, the obligation of which the legislature had no power to impair. The right of the company to receive and collect toll at their gates, erected in conformity to the charter, is a franchise, and is undoubtedly private property. Among the means by which the company exercised and enjoyed their franchise, were their gates. The sections of the act of 1853–4, above copied, if valid, take away the franchise, or part of it, without compensation, without a trial by jury, without due process of law, and evidently impair the obligation of the contract, created by the charter, between this State and the company.

Beyond all question, these sections of that act are, as to the Central Plank-Road Company, unconstitutional and void.—Bank of the State v. Bank of Cape Fear, 13 Iredell, 75; New Orleans, Jackson and Great Northern R. R. Co. v. Harris, 27 Mississippi Rep. 517; Matter of Hamilton Avenue Brooklyn, 14 Barb. Sup. Ct. Rep. 405; Constitution of United States, Article I, § 10; Constitution of Alabama, Article I, §§ 10, 13, 28; Baugher v. Nelson, 9 Gill's R. 299.

As these sections are unconstitutional and void as aforesaid, the throwing open the gates of the Central Plank Road-Company, under them, did not, *per se*, alter or affect the duties, rights or relations between the garnishee and that company, then existing and arising under or out of a valid contract previously made between them: The contract between the company and the garnishee, mentioned in his answer, and the obligations and rights of the parties under that contract, were not in the least changed or affected by the aforesaid throwing open of the gates.

One of the obligations implied by law from that contract, as set forth in the answer of the garnishee, was, that the company would keep their road, and every part of it, in good order for the period covered by the contract. If they did not keep every part of it in such order, their failure to do so was a breach of their contract, which could not be excused by the throwing open of their gates by the commissioners under the act of 1853–4 above cited. Another obligation of the contract was, that the stages of the garnishee, during the period covered by the contract, should not in any manner be obstructed or hindered by the company in running or passing on the road. Any such obstruction or hinderance was a breach of the contract. Any such breach of the contract on the part of the company gave to the garnishee the election to abandon the contract, or to hold on to the contract, and claim the damages resulting to him from such breach, and also a deduction from the contract price of so much as the running his stages on the road was worth less on account of such breaches. The company cannot be permitted to

gain by their fault in violating the contract.—Hayward v. Leonard, 7 Pick. R. 181; Dubois v. Delaware & Hudson Canal Co., 4 Wend. R. 285; Jewett v. Weston, 11 Maine R. 346; Smith v. Smith, 1 Sandf. S. C. R. 206; Liggett v. Smith, 3 Watts' R. 331; Thornton v. Place, 1 Moody & Rob. 218; Ritchie v. Atkinson, 10 East's R. 296; Taft v. Montague, 14 Mass. R. 282; 2 Greenl. on Ev. § 104.

It seems from the answer of the garnishee, that before the period covered by the contract had expired, the company abandoned the road, and had no agent on the road to receive or claim toll. After such abandonment, and during its continuance, the company is not entitled to recover toll, unless under an express contract. The law will not imply a promise to pay toll on the part of a person passing on the road, during such abandonment. By accepting the charter, an obligation was cast upon the company to provide agents, and keep them on the road ready to receive toll from all who were ready and willing to pay it. It is essential to their right to toll, upon the idea of an *implied* contract to pay it, that they should first furnish to persons using the road this easy and convenient opportunity for paying it.

The counsel for the appellee contends, that the charter conferred on the company "an unlimited power as to tolls." It is not absolutely necessary, in this case, for us to decide that question. But we wish to be understood as not assenting to the position taken by the counsel. Such franchises are restrictive on the public; and, when they are granted in such general terms as are employed in the charter shown in this case, the words are to be construed most strongly in favor of the public. We cannot think the legislature intended by the words employed, to confer upon the company the power to fix an *unreasonable* rate of toll, or to collect *unreasonable* toll. The charter does not *express* any such intention. Many charters confer, in general terms, the power to pass by-laws; yet the courts have often pronounced by-laws void, because they were *unreasonable*. Why may not the courts exercise a similar power, in case palpably *unreasonable* toll is demanded?—See Wales v. Stetson, 2 Mass. Rep. 143;

Chadwick v. Moore, 8 Watts & Serg. 49; Baugher v. Nelson, *supra;* Islington Market Bill, 3 Clarke & Fin. 513; 2 Wend. Bl. Com. 38, note, (53.)

We have said enough to show that the judgment of the court below is erroneous, and prejudicial to the garnishee. The views above expressed will probably enable the court below to determine what judgment should be rendered upon the answer, in case the contest pending upon it shall be decided in favor of the garnishee. The pendency of that contest is enough to prevent us from rendering the proper judgment on the answer. All we can do, is to reverse and remand.

Judgment reversed, and cause remanded.

FITZPATRICK'S ADM'R *vs.* BAKER.

[ASSUMPSIT ON SPECIAL CONTRACT.]

1. *Restoring competency of witness by release.*—To restore the competency of an interested witness by a release, it is necessary that the release should be made known to him before he testifies: where a deposition is taken in a distant State, and the release is written on the same sheet of paper which contains the instructions to the commissioner, to whom it is thus sent, and by whom it is returned with the deposition, these facts are not, *per se*, sufficient to authorize the admission of the deposition.
2. *When motion to suppress deposition must be made.*—In a case not governed by the provisions of the Code, it is not necessary that a motion to suppress a deposition, on account of the incompetency of the witness from interest, should be made before the commencement of the trial, when it appears that a specific objection to the competency of the witness on that ground was made before filing cross interrogatories.
3. *Specification of grounds of objection.*—When a party offers a deposition, accompanied by a release of the witness, admitting that he is incompetent without a release; and the opposite party thereupon objects to the deposition, on the ground that it did not appear that the release was known to the witness, the objection is sufficiently definite and specific.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. ROBT. DOUGHERTY.

THIS action was brought by Abram Martin, as administrator *de bonis non* of Joseph Fitzpatrick, deceased, against William H. Baker; and was commenced in December, 1850. The cause of action, as endorsed on the writ, was "a promise by the defendant, to one Charles Cook, to pay to the executor of Joseph Fitzpatrick, deceased, the amount of a judgment recovered by said executor against said Cook, in the county court of Macon county, in consideration of the sale of 240 acres of land in section 34, 14, 24, and the transfer by said Cook to said defendant of the bond of Jas. C. Watson & Co., for the east half of said section; also, upon defendant's promise to said Cook to pay the holders and owners of two notes, given by said Cook to said Jas. C. Watson & Co., one for $400, and the other for about $420, in consideration of the sale by said Cook of 240 acres of land," &c.

On the trial, as appears from the bill of exceptions, the plaintiff offered in evidence the deposition of said Charles Cook, which was taken on interrogatories and cross interrogatories. This deposition was excluded by the court, on the objection of the defendant; to which the plaintiff excepted, and which he now assigns as error.

MARTIN, BALDWIN & SAYRE, for the appellant.
GEO. W. GUNN, *contra*.

WALKER, J.—The sole question of this appeal is, whether the court erred in excluding the deposition of the witness Cook, on account of his interest in the case. It was agreed in the court below, that the witness was incompetent without a release, and that the testimony was pertinent. The arguments in favor of the admissibility of the testimony are, that the competency of the witness was restored by a release; that the objection should have been made by a motion to suppress the deposition before the trial; and that the objection was not sufficiently specific.

1. The mere execution of a release can not render a witness, having a disqualifying interest, competent. The

bias, presumed to result from the interest, can only be removed, when the witness is informed of the release. Hence it is requisite that the release should be made known to the witness before he testifies.—Brown v. Brown, 5 Ala. 508; Seymour v. Strong, 4 Hill, 255; Kyle v. Bostick, 10 Ala. 589. The deposition was taken in Arkansas; and the release was written on the same sheet with the commission, was sent to the commissioner, and returned by him. These are the only facts bearing upon the point; and from them it is impossible to deduce any thing more than a *probability*, that a knowledge of the release was communicated to the witness, before he testified. The antecedent knowledge of the release was a *fact* to be proved, before it could become the predicate of judicial action; and it would have been wrong for the court to have treated that fact as proved, by testimony from which it was not fairly inferrible.—Scott v. Cox, 20 Ala. 294.

The case of Seymour v. Strong, *supra*, differs from this. In that case, the commissioner was requested to show the release to the witness. No such request was proved in this case. On that account, the decision in that case is no authority here; and it is unnecessary for us to determine, whether upon the same facts we would follow it, in presuming that the commissioner did as requested, by exhibiting the release to the witness before he testified. It was not the duty of the commissioner to inform the witness of the release. His only duty under the commission consisted in taking the deposition. The duty was not imposed upon him by request or command. It was not necessary that the witness should, before testifying, see the commission; or, if he did see it, it would not follow that he perceived and read the release. It therefore follows, that neither the presumption that the commissioner did his duty, nor the presumption that the commissioner would do as requested, nor the presumption that the witness did all which it was necessary for him to do, avails to prove that the witness knew of the release before he testified.

2. The question, whether a motion to suppress the

deposition before the trial was necessary, is to be determined by the law existing before the Code was adopted, for the suit was commenced in 1850. Full and specific objections to the examination of the witness, on the ground of incompetency from interest, precede the cross interrogatories, which purport to be filed for the purpose of providing for the contingency of the commissioner's overruling the objections. There can, therefore, be no question, that the objection was made at the earliest possible time. The objection having been made in due time, the law, as settled in this State before the Code, compels us to dissent from the proposition, that a motion to suppress before the trial was necessary.—Bryant v. Ingraham, 16 Ala. 116; Jordan v. Jordan, 17 Ala. 466. There is no case or principle known to us, which would make a motion to suppress the deposition the only mode of taking advantage of the incompetency of the witness from interest.

3. The plaintiff offered the deposition, accompanied by the release; and admitted, that the witness was incompetent without the release. The defendant then objected to the deposition, upon the ground that there was no evidence that the witness knew of the release. The court sustained the objection. The objection made was certainly definite and specific. It was not necessary that the defendant should have pointed out the reason why the witness was interested, when his interest was admitted by the plaintiff. The objection which precedes the cross interrogatories was certainly sufficiently specific and definite, to inform the complainant of its nature, and of the ground upon which it was predicated, and to enable him to remove it, if he chose to do so; and that is certainly all that the law could require him to do. The declaration itself, taken in connection with the objection, would indicate clearly to the plaintiff, for what judgment the witness was interested in making the defendant liable.

We have carefully examined the appellant's several arguments, and we can find no error in the rulings of the circuit court. We must, therefore, affirm the judgment, notwithstanding it may seem to us, that the cause of jus-

tice would be promoted by a reversal. Our only power is to revise the decisions of the court below upon questions of law.

CAMPBELL *vs.* MAY.

[SUPERSEDEAS OF EXECUTION.]

1. *Construction of agreement as to extinguishment of judgment.*—Where a judgment debtor transfers to his creditor a claim for services rendered as special register in a chancery cause, under an agreement that the amount allowed and realized on it is to be applied to the payment of the judgment, and that the judgment is to be extinguished if $700 is realized from the claim,—the judgment is not extinguished, if less than $700 is allowed and realized on the claim, although the defendant himself pays enough to make up that amount.
2. *Summary judgment on supersedeas bond.*—There is no statute now of force in this State which authorizes a summary judgment against the surety on a *supersedeas* bond.
3. *Judgment reversed and rendered.*—In reversing a judgment on appeal, the appellate court will render the proper judgment, (Code, § 3034,) when the record states facts sufficient to authorize it.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THE appellee in this case obtained judgment against James H. Campbell, in the circuit court of Dallas, on the 13th November, 1851, for $734 93. An execution was issued on this judgment, which was stayed by the execution of a bond by the defendant, with Andrew J. Campbell as his surety. On the 23d April, 1853, said James H. Campbell transferred to Mess. Lapsley & Hunter, agents and attorneys of said plaintiff, "his claim for services as special register in the case of Pearson and others v. Darrington and others," under an agreement, as specified in their receipt, "that said claim, when collected, is [was] to be applied to said judgment; and if the sum of $700 is [was] allowed and realized on said claim, it is [was] to be

a full satisfaction of said judgment; but, if said sum is [was] not allowed and realized, whatever less sum may [might] be realized and allowed is [was] to be applied as far as it will [would] go to the satisfaction of said judgment." The sum of $500 was allowed by the court on said claim, of which $250 was collected by plaintiff's said agents; and Campbell afterwards paid them $200, which was credited on the judgment. Another execution being issued on the judgment, against the defendant and his surety on the stay bond, the defendants therein filed their petition for a *supersedeas;* alleging, in addition to the facts above stated, that the balance of the transferred claim was in process of collection by plaintiff's said agents, and that the amount due on the judgment was fully paid and satisfied. The court below sustained a demurrer to the petition, and rendered judgment against the original defendant, together with his surety on the *supersedeas* bond, for the balance due on the execution, with costs; and its judgment is now assigned as error.

GEORGE W. GAYLE, and JAMES H. CAMPBELL, for the appellants.

WATTS, JUDGE & JACKSON, *contra.*

STONE, J.—We do not think there is any thing in the point, that the record in this case contains no *fiat*, granted by a judge of the circuit court, authorizing the issue of a *supersedeas*. The bond recites that such order was made, and we think this sufficient evidence of the fact.—See Henderson v. Bank of Montgomery, 11 Ala. 855–59; Mead v. Figh, 4 Ala. 279; Meredith v. Richardson, 10 Ala. 829.

The demurrer to the petition for *supersedeas* was rightly sustained. The plain, unmistakable language of the agreement signed by Messrs. Lapsley & Hunter, contains two distinct, and, as we think, alternate stipulations. It provided, first, that the transfer of appellant's claim for services as special register, in the case of Pearson and others v. Darrington, was to be a full satisfaction of the judgment, *if the sum of seven hundred dollars is* [*was*] *allowed and*

realized on said claim. Secondly, if said sum is not allowed and realized, whatever less sum may be realized and allowed, is to be applied, *as far as it will go*, to the satisfaction of said judgment.

There was only the sum of five hundred dollars allowed for said services. Hence, the event, on the happening of which this allowance was to be "a full satisfaction of the judgment," never happened. It is no answer to this view, that the remaining two hundred dollars were paid by the petitioner. That payment did not bring the case within the terms of the contract; and, consequently, does not authorize the *supersedeas* in this case. Each party has the clear right to stand on the terms of his contract; and we have no authority to engraft other stipulations upon it, upon the idea that such stipulations would be equally beneficial with those actually agreed on. We sit here to enforce, not to create or modify contracts.

We find no provision in the Code, which authorizes a summary judgment on a bond such as is copied in this record. This is an ordinary *supersedeas*, granted by a circuit judge under section 629, subdivision 1, of the Code. The only sections which refer, in express terms, or by fair implication, to the writ of *supersedeas*, in its general acceptation, are the one above cited, and section 2406, subdivision 2. Neither of them mentions a bond, or any mode of fixing liability upon it. We will not say a judge may not, in all cases, demand a bond as a condition upon which he will grant a *supersedeas*. It is clear, however, that the right to render a summary judgment upon such bond is purely statutory; and if the statute give no such right, the judgment can not be rendered.

If it be contended that section 2415 of the Code authorizes a summary judgment on all bonds taken under the provisions of that chapter, the answer is, that this bond does not belong to that class. The sections 2407, 2408, 2409, 2410, and 2411, show the class of bonds specially referred to in that chapter. They are bonds given under sections 2407–8 upon the order of a circuit judge, as is shown by section 2409. Sections 2410–11 are but a continuation of the relief provided by sections 2407–8–9.

The *bonds* mentioned in section 2415, when taken pursuant to an order made by a circuit judge, must refer to the sections above named, for no other bonds are in terms authorized by any provision of that chapter.

It results from these principles, that the circuit court of Dallas erred, in rendering judgment upon the *supersedeas* bond. After sustaining the demurrer to the petition, the court should have rendered no further judgment than one against the petitioner, for costs.

Under section 3034 of the Code, it is our duty to render such judgment as the court below should have rendered, when the record enables us to do so. The record in this case does enable us to do so.

It is therefore considered by the court, that the defendant's demurrer to the petition be sustained, and that the petition be dismissed; and that the defendant recover of the petitioner the costs accruing under said petition in the court below.

Let the appellee pay the costs of this appeal.

NOTE BY REPORTER.—On a subsequent day of the term, the following opinion was delivered:

STONE, J.—Since the foregoing opinion was pronounced, the counsel for the appellee has submitted an application for a rehearing, on that portion of the opinion which asserts that the Code confers no authority for rendering a summary judgment against the sureties on the *supersedeas* bond. We have re-examined the sections of the Code to which our attention has been directed, and the result is a confirmation of our first opinion.

Section 2406 of the Code confers on the *circuit court* power "to secure parties or privies in their rights, against any oppression or abuse of execution, or upon any release, discharge or payment after judgment." It will be observed that this section speaks alone of the "circuit court," and not of *judges* of the circuit court. Between the circuit court, and the judge of that court, there is a wide and well defined distinction.—*Ex parte* Grant, 6 Ala. 91.

Chapter 17, title 1, part 3 of the Code, page 443, commencing with section 2406, observes that distinction. It contains no provision for a petition "to a judge of the circuit court," as the initiatory process for obtaining the relief provided by section 2406. Section 2409 does authorize such petition, in cases within the provisions of sections 2407 and 2408. All the subsequent sections of the chapter relate, either expressly, or by necessary implication, to cases commenced "by petition to a judge of the circuit court," as provided by section 2409, and can not be made to apply to the provisions of section 2406, unless, perhaps, in one contingency. If the circuit court, under the authority conferred by section 2406, make an order for stay of execution, and require a bond as a condition of such stay, we do not now decide whether section 2415 would apply to such bond.

We hold, that the *supersedeas* and bond in this case are dependent for their validity on the principles of the common law, and section 629, subdivision 1, of the Code; and, as a consequence, that no summary judgment could be rendered on it, or summary execution issued against the sureties.

DUFFIE *vs.* PHILLIPS.

[ACTION ON PROMISSORY NOTES—PLEAS, STATUTE OF LIMITATIONS, AND DISCHARGE IN BANKRUPTCY.]

1. *Variance.*—In an action on a promissory note barred by the statute of limitations, to which the defendant pleads the statute of limitations and bankruptcy, and the plaintiff replies a subsequent promise, proof of a subsequent promise by the defendant to pay the principal only, without the interest, does not entitle the plaintiff to a recovery.
2. *Parol evidence of indebtedness.*—The issue being whether the defendant was able to pay a debt barred by the statute of limitations and of bankruptcy, he may prove his indebtedness to third persons, without producing the written evidence of that indebtedness, or accounting for its non-production.

APPEAL from the Circuit Court of Russell.
Tried before the Hon. C. W. RAPIER.

THIS action was brought by Solomon Phillips against Thomas Duffie, and was commenced on the 18th February, 1856. The complaint claimed of the defendant "the sum of $390, with interest thereon, due by thirteen promissory notes, made by him on the 13th January, 1840, in the sum of $30 each; also, the further sum of $3 24, due by promissory note, made by him on the 30th January, 1840, and payable on the 25th December, 1840, with interest thereon." The defendant pleaded, among other things, the statute of limitations of six years, and his certificate of discharge as a bankrupt; to each of which the plaintiff replied a subsequent promise.

On the trial, as appears from the bill of exceptions, the plaintiff proved, by one William White, "that he presented the notes sued on to defendant, for payment, on the 28th July, 1850; that the defendant then refused to pay them, but said, that they were just, and that he would take them up when he got able—that he would pay the principal, but not the interest; and that he refused positively to give new notes in their stead, saying, 'that he would pay the old notes as well as new ones.'" For the purpose of proving the defendant's ability to pay the notes, the plaintiff then offered evidence of the value of his property, as shown by the return of the tax-assessor; and to rebut this evidence, the defendant "offered to prove his indebtedness to an amount greater than the value of his property, and, for this purpose, offered to prove by several witnesses the amount of his indebtedness to them respectively, as evidenced by promissory notes." This evidence the court excluded, "because said promissory notes were not produced, nor their absence accounted for;" and the defendant excepted.

The court charged the jury, among other things, "that if they believed the defendant, within six years before the commencement of this suit, promised to pay the notes, as testified by the witness White; and that the defendant, at any time between the making of such promise and the

commencement of this suit, had property and means, other than such as were exempt from levy and sale under execution at law, and after paying and satisfying his other debts, sufficient to pay the notes sued on,—then the plaintiff was entitled to recover the principal of the notes sued on, with interest thereon from the time when the defendant so became able to pay them;" to which charge the defendant excepted.

The charge given, and the exclusion of the evidence, as above stated, are now assigned as error.

JOHN A. LEWIS, for the appellant.
CLOPTON & LIGON, *contra.*

RICE, C. J.—A recovery for a demand barred by the statute of limitations, or by a discharge in bankruptcy, "is always upon a new cause of action; although this is not apparent, where the declaration is in debt or assumpsit, on an executed consideration, because the form of pleading is so general, as to admit of any proof which shows an obligation, founded on the consideration, and between the parties, set forth in the declaration." Although the old debt is revived by an express promise to pay it, yet there is a new cause of action. An express promise to pay only *a part* of the old debt will not revive it, but gives a new cause of action, co-extensive with the promise.—See Whitcomb v. Whiting, and the notes thereto, as reported in 1 Smith's Leading Cases, (edition of 1855,) top pages, 721–729; Evans v. Carey, 29 Ala. R. 99; Ross v. Ross, 20 *ib.* 105.

When the only causes of action declared on are promissory notes, and they are barred by the statute of limitations and a discharge in bankruptcy; and the statute and discharge are pleaded, the plaintiff cannot recover, without proving a new cause of action within six years, consistent with at least one of those set forth in the complaint, and corresponding with it in every particular, except the period from which it dates its existence.—See 1 Smith's Leading Cases, *supra.*

A promise, made several years after the notes had be-

come due, and a considerable amount of interest had accrued upon them, to pay the principal sum for which they were given, *but not the interest*, is materially different and variant from a promise to pay that sum *and the interest*. Pool v. Relfe, 23 Ala. R. 701; Pattterson v. Sawyer, 11 *ib.* 523.

When, as here, the only counts in the complaint claim the sum for which the notes were given, *and the interest thereon;* and the notes are barred by the statute of limitations and the discharge in bankruptcy; and the statute and discharge are pleaded; and a subsequent promise is replied,—proof of an express promise by the maker of the notes, to pay the principal sum, "but not the interest," does not entitle the plaintiff to recover. The promise proved is materially variant from that set forth in the replication; and if it had been set forth in the replication as it was proved, the replication would have been held bad on demurrer, for a *departure* from the complaint. In such cases, the replication is in the nature of a new assignment, and is bad if it departs from the complaint. And a plaintiff certainly cannot be permitted to recover under a good replication, upon the proof of a promise, the insertion of which in his replication would have made it bad for departure.

We decide nothing now as to the right of the plaintiff to recover upon the promise proved, under a complaint which counts on that promise, and sets forth the notes or original debt as the consideration for it.

2. The defendant had the right to prove his indebtedness to others, without producing the notes which evidenced that indebtedness, or accounting for their non-production.—Graham v. Lockhart, 8 Ala. R. 9.

In excluding evidence of such indebtedness, upon the mere ground that the notes evidencing it were not produced, and in the charge given, the court below erred. For those errors, the judgment is reversed, and the cause remanded.

BLOODGOOD *vs.* GRASEY.

[SUIT FOR FREEDOM.]

1. *Conclusiveness of judicial decisions.*—A judicial decision is to be regarded as conclusive, not only of the point presented in argument and expressly decided, but of every other proposition necessarily involved in attaining the conclusion expressed.
2. *Proof of foreign law by adjudged cases.*—A decision of the highest judicial tribunal of a foreign State, construing one of its statutes, is to be received elsewhere as an authoritative exposition of the construction of the statute; and its weight or authority is not affected by the fact that it was made after the transaction elsewhere in controversy arose, or after the persons to be affected by it had left the State.
3. *Construction of Maryland statute respecting emancipation of slaves.*—The statute of Maryland respecting the emancipation of slaves, enacted in 1752, and continued in force by successive statutes until 1796, requires two attesting witnesses to a deed providing for the prospective emancipation of slaves.
4. *Estoppel by judgment.*—A judgment in a former suit for freedom, in favor of the petitioner's mother, rendered after the birth of the petitioner, does not operate an estoppel on one claiming under the defendant therein.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. MCKINSTRY.

THIS was a petition for freedom, under section 2049 of the Code, by Grasey and her children, who are described in the proceedings as "persons of African descent," against Hildreth Bloodgood and his wife, who claimed them as slaves. The petitioners claimed their freedom under a deed of manumission from Josias W. Dallam to the maternal grandmother of Grasey, with other slaves; which was executed in Maryland, and of which the following is a copy:

"To all whom these presents shall come, Greeting: I, Josias W. Dallam, of Harford county, in the State of Maryland, for divers good causes and considerations me thereunto moving, do hereby declare free, manumit and enfranchise, the negroes following, to-wit: *Cromwell*, to be free at the expiration of *too* years; *Malborough*, at the expiration of four years; *Orange*, at the expiration of five

years; *Lemon*, at the expiration of eleven years; *Hannah*, at the expiration of thirteen years; *Nance*, at the expiration of fifteen years; *Sook*, at the expiration of seventeen years from the date of this manumission. All the children, or children's children, that may *desend* from said negroes, and be born in slavery from the date hereof, shall be free at twenty-three years of age. Hereby acknowledging the said negroes discharged from all claim of service, and right of property whatever, from me, my heirs, executors and administrators, at the periods above specified. As witness my hand and seal, this thirteenth day of March, in the year of our Lord one thousand seven hundred and eighty-seven."

"JOSIAS WM. DALLAM, [seal.]"

"Attest: John Archer."

The petitioner Grasey was the daughter of one Matilda, who was the daughter of Hannah, one of the slaves mentioned in the deed. To prove the validity of the deed of manumission, the petitioners read in evidence a certified copy of a statute law of Maryland, which was enacted on the 23d June, 1752, and continued in force, by successive statutes, until 1796; an extract from which, "containing all the provisions of the law of Maryland on the subject of the emancipation of slaves, so far as pertinent to the case, that was introduced in evidence," is made an exhibit to the bill of exceptions, and is as follows:

"An act to prevent disabled and superannuated slaves being set free, or the manumission of slaves by any last will and testament; approved 23d June, 1752.

" * * * And to the end that hereafter there may be an uniform and regular manner of granting freedom to slaves, *be it likewise enacted*, that where any person or persons, possessed of any slave or slaves within this province, who are or shall be of healthy constitutions, and sound in mind and body, capable by labor to procure to him or them sufficient food and raiment, with other requisite necessaries of life, and not exceeding fifty years of age; and such person or persons, possessing such slave or slaves as aforesaid, and being willing and desirous to set

free or manumit such slave or slaves, may, by writing under his, her or their hand and seal, evidenced by two good and sufficient witnesses at least, grant to such slave or slaves, his, her or their freedom; and that any deed or writing, whereby freedom shall be given or granted to any such slave, which shall be intended to take effect in future, shall be good to all intents, constructions and purposes whatsoever, from the time that such freedom or manumission is intended to commence by the said deed or writing, so that such deed and writing be not in prejudice of creditors, and that such slave, at the time *of* such freedom or manumission shall take place or commence, be not above the age aforesaid, and be able to work and gain a sufficient *livelyhood* and maintenance, according to the true intent and meaning of this act; which instrument of writing shall be acknowledged before one justice of the peace, of the county wherein the person or persons granting such freedom shall reside; which justice shall endorse on the back of such instrument the time of the acknowledgment, and the party making the same, which he or they, or the *partys* concerned, shall cause to be entered among the records of the county court where the person or persons granting such freedom shall reside, within six months after the date of such instrument of writing; and the clerk or clerks of the respective county courts within this province shall, immediately upon the receipt of said instrument, endorse the time of his receiving the same, and shall well and truly enroll such deed or instrument, in a good and sufficient book in folio, to be regularly alphabeted, in the names of both parties, and to remain in the custody of said clerk or clerks for the time being, among the records of the respective county courts; and that the said clerk or clerks shall, on the back of every such instrument, in a full, legible hand, make an endorsement of such enrollment, and also of the folio of the book in which the same shall be enrolled, and to such endorsement set his hand; the person or persons requiring such entry paying the usual and legal fees for the same. And be it likewise enacted, that a copy of such record, duly attested under the seal of such office, shall,

at all times hereafter, be deemed, to all intents and purposes, good evidence to prove such freedom. And to the end that this act may be duly observed, the justices of every county court within this province respectively shall, at their respective county courts to be held in March yearly, give in charge to the respective grand juries of each respective county to inquire into any breaches made contrary to this act. This act to continue for three years, and to the end of the next session of assembly which shall happen after the expiration of the said three years."

When the petitioners offered in evidence the certified copy of the deed on which they based their claim to freedom, the defendants objected to its admission, on several grounds, one of which was, "that said deed was not evidenced by two witnesses, as required by the said Maryland statute of 1752;" and, "to show the judicial construction of said act by the courts of Maryland," read to the court the reports of the following adjudged cases before the court of appeals of Maryland: Negro James v. Gaither, 2 Har. & John. 176–78; and Young v. State of Maryland, 7 Gill & John. 253–62. On the authority of these decisions, construing the Maryland statute, the defendants objected to the admission of the deed offered by the petitioners, and moved the court to exclude it from the jury; but the court overruled the objection, and the defendants excepted.

The petitioners, having adduced evidence tending to show that Grasey was the daughter of Matilda, was born about the year 1820, was run off from Kentucky by a son of Mrs. Molly Townsend, against whom Matilda had previously instituted a suit for her freedom, and that the defendants in this suit claimed by purchase under said Townsend,—offered in evidence a certified transcript of the Kentucky suit, wherein the petitioner claimed her freedom under the deed now in controversy; which suit was commenced on the 4th May, 1831, and was decided in favor of the petitioner. The defendants objected to the admission of this transcript, "as not being competent evidence against them for any purpose;" further, "that it was not admissible, except as evidence that Matilda

recovered a judgment of freedom in that suit;" and "that it was not admissible, except as evidence that Matilda, at the time of the impetration of the writ, was entitled to her freedom." The court overruled each of these objections, and admitted the transcript; "remarking, that the jury would be instructed as to its effect, when the evidence was closed;" to which rulings of the court the defendants excepted.

Other objections were made to this transcript, and other questions as to the admissibility of evidence were made; none of which, however, require special notice.

The court charged the jury as follows:

"1. That the deed of Josias W. Dallam was, under the laws of Maryland, valid and effectual to entitle the negro Hannah, therein mentioned, to her freedom at the expiration of thirteen years from its date; that any child of Hannah, born during that interval of thirteen years, would be entitled to her freedom at twenty-three years of age; that if the jury believed that Matilda was the child of Hannah, and was born during the said period of thirteen years, she would be entitled to her freedom at the age of twenty-three years; that if Grasey was the child of Matilda, and was born before Matilda reached twenty-three years of age, she would be entitled to her freedom at the age of twenty-three, and her children, born after that time, would be free; and that if Grasey was born after Matilda had reached the age of twenty-three, then she was born free, and she and all her children are entitled to their freedom.

"2. That if the jury believed that the defendants held the petitioners as slaves under Molly Townsend, then the judgment in favor of Matilda against said Molly Townsend would be evidence against them; that if Grasey was born after that judgment, then these defendants are bound by that judgment; but, if she was born before that judgment, then it is not conclusive, but is a circumstance, or part of the chain of evidence in the cause, which the jury will take into their consideration."

The defendants excepted to each one of these changes; and they now assign them as error, together with the

rulings of the court on the evidence, and other matters which require no particular notice.

P. Hamilton, for appellant.—1. The deed of Josias Wm. Dallam, even if the original had been duly proved and offered in evidence, should not have been permitted to go to the jury, because it did not comply with the act of 1752. The deed is attested by *only one witness:* the law requires, it "*shall be evidenced by two good and sufficient witnesses at least.*" The language of the law is plain. The object declared is, to provide a uniform and regular mode of manumission. The law points out that mode. Any person, desirous of granting freedom to his slaves, may do so, if the slaves are healthy, capable of maintaining themselves, and under fifty years of age, by writing under his hand and seal, evidenced *by two good and sufficient witnesses at least.* This is the general provision, applicable to all cases of manumission: then comes the case of a manumission *in futuro.* In such case, the act shall be good at the time appointed, if then not in prejudice of creditors, and the slave not above fifty years old, and able to maintain himself. Then come the general provisions, that the instrument of freedom shall be acknowledged before a justice of the peace, who shall endorse the date of the acknowledgment, and then be registered among the records of the county court. There is no intention on the face of the act to make any different formalities, in the cases of a present and future manumission. The same mode of proceeding is required in the two cases. That of future freedom is mentioned by way of parenthesis, and to avoid what might be a difficulty as to the age of the negro; whether it applied to the date of the deed, or to the time when the right to freedom accrued. There is no punctuation in the act, to point out *two classes* of cases. The act speaks in one sentence, and points out the one mode of proceeding for all cases. And such is the construction of this act by the court of appeals in Maryland. Negro James v. Gaither, 2 Har. & J. 176; 7 G. & J. 262; 5 Howard's R. 72. The act of 1796 on this subject is the same as that of 1752.—See Laws of Maryland; 5 How. R.

72; 4 Cranch C. C. R. 189. The decisions 2 H. & J. and 4 Cranch, were upon manumissions to take effect *in futuro*.

The judicial decisions of a State, upon its own statutes, will be received in the courts of another State, as forming part of the law itself: they are binding and conclusive. 3 Sandf. R. 416; 3 Strob. Eq. 263; 3 Zabriskie's R. 590; 10 Wheat. R. 152; 11 Law Rep. 207; 12 Wheat. R. 153; 4 Pet. R. 127; 5 *ib.* 151; 6 *ib.* 291; 1 Brock. R. 539.

With regard to the manumission of slaves, the law has uniformly been declared to be, that the provisions of the statute must be strictly complied with.—4 Harrison's R. 173; 1 Penning. R. 10; 6 Rand. R. 561; 1 *ib.* 15; 6 Munf. R. 191; 5 H. & J. 111; 2 Leigh R. 300. For it is not the policy of the law to manumit slaves.—11 Mo. R. 193. And in Maryland, the strictest adherence to the letter of the law has been enforced.—5 How. R. 72. In this case, the deed is evidenced by only one witness: and that being so, under the law established in Maryland, the deed offered in evidence was not admissible, and should have been excluded; or, if admitted, the court should have charged the jury, the petitioners were not entitled to their freedom.

2. As to the admissibility and effect of Matilda's suit for freedom in Kentucky: Mr. Bloodgood was no party to that suit, nor was any privity established between him and Mrs. Townsend. The petitioner's counsel did not undertake to establish it. They promised only to connect the possession of Mrs. Townsend, with that of the party next before Bloodgood: but even that was not done. They did not show whence Bloodgood acquired his possession. They made a show of proof down to a Mr. Cheesborough. Now the burthen was on them. They did not show that the vendor of Hazard was the man Allen Townsend, who took the negroes from Kentucky. A year after the time of their removal, a man of the same name, but apparently from Washington county, in Alabama, sold the slaves to Hazard—1 S. & R. 175; 1 Wheat. R. 6; 2 Cranch R. 23. It is conceived the court below erred in permitting the record to be admitted for any pur-

pose, beyond showing the fact that Matilda had in a certain suit recovered a judgment of freedom, or that she was entitled to her freedom at the time the suit was brought. The statement of the testimony contained in the transcript should not have been admitted. It does not appear that the substance of all the witnesses swore was therein contained.—22 Ala. R. 700. As to the evidence of Drane, Bailey and Smith, it is perfectly clear that all was not there. Their evidence of a particular matter only is stated; and that is given as the conclusion of the party, who prepared the bill of exceptions. No original depositions were produced, nor were copies of such originals produced, No witness was introduced to prove that he had made copies of such depositions, and that the copies were correct. Admitting that, if such had been done, the evidence was competent, still the court has no certainty that it has got copies of their evidence, or a statement of the substance of their evidence. The statement of evidence is not contained in the judgment of the court. We have here nothing but a certificate of the clerk that the transcript contains "as full a transcript of the records and proceedings as the same remain on file in his office." This evidence appears only in the bill of exceptions. We don't know what the law of Kentucky is, with regard to bills of exceptions. It is a subject altogether of statute regulation, not known to the common law. It is prepared for a particular purpose, and for that purpose only forms a part of the record. A statement contained in such a document cannot be made evidence generally; much less can a mere copy of the document be made evidence in another cause, between other parties.

3. What is the effect of the deed of 1787 on these petitioners? They were never in the possession of the grantor: there was no proof that they were ever in Maryland. Admitting they came from Kentucky, we do not know what was their status by the laws of that State. 12 Ala. R. 728. Being of African descent, they are to be presumed slaves: it will not be presumed the laws of another State permit emancipations.—7 Mo. R. 197; 2 Rob. Va. 58; 11 Mo. 193; or that they forbid slavery.

9 Mo. R. 3. Negroes are slaves here, and their emancipation is prohibited. These petitioners claim freedom, under a grant to their grand and great grand mother in 1787. They have been held slaves in this State, the mother since 1831, twenty-five years, and the children, all their lives. The deed gives freedom to all the descendants of Hannah, after they reach twenty-three years of age. What is the effect of that deed in Kentucky? We do not know. What is its operation here? Does the law of this State recognize this mongrel status? And are its free citizens liable to be defrauded of their property, by stale demands resting on old deeds made in foreign jurisdictions, of which they cannot be advised? As long as property in slaves is recognized, protection should be extended over that property. The right to such property is based on possession. The origin of that possession cannot be inquired into. If it can, the property no longer exists, for it cannot have commenced in right. How long back must the possession have existed? Or is there no prescription to the claim? There is a prescription, of necessity, to the general right. Is there none in particular cases? The general limitation of twenty years should apply. It is no hardship to the slave, for he knows no better condition; and the general good of the country demands that the mixture of free and bond should not exist in the community, and certainly that this mongrel state of neither bond nor free should not be tolerated. Such certainly is the declared policy of the State of Alabama.

Jno. T. Taylor, and A. J. Requier, *contra*.—1. The Maryland statute does not require any witness at all to a deed of prospective manumission. It evidently provides for two classes of deeds: those which take effect *instanter*, and those which take effect *in futuro;* and two witnesses are required to the former only. This is the evident meaning and intention of the act; and no plausible objection to this construction, looking only to the act itself, could be urged. The deed under which the petitioners claim their freedom, providing for prospective

emancipation of the slaves named, and being duly acknowledged and recorded as the statute directs, is sufficient to establish their claim.

2. The appellants seek to avoid this construction of the statute, by proof of a different construction by the courts of Maryland, as shown by the reported case of James v. Gaither, 2 Har. & John. 176; and the question is thus presented, whether that decision estops this court from examining and construing the statute for itself. It is admitted, that this court would yield to the authority of the Maryland court, if the very same point was presented in each case, was actually considered and decided by the former, and was necessary to the decision; but it is insisted, that all these facts must appear, to make such decision conclusive on this court. The courts of one State, in construing the statutes of another, will look to the judicial decisions of the latter, not as constituting an estoppel, but on principles of comity, and on the supposition that the courts of each State are the best judges of the proper construction of their own local laws. Hence, to give weight and authority to such decisions, the very point in issue must appear to have been considered—to have been in the mind of the court, and actually decided. This doctrine is held by the courts of Maryland, and by other courts almost universally.—Matthews, Finley & Co. v. Sands & Co., 29 Ala. 136; 5 Maryland, 489; 16 Howard, 286; 1 Wheaton, 290; 10 *ib.* 164; 11 *ib.* 369.

What was the point actually considered and decided in the case of James v. Gaither? That case was decided at an early day, when the decisions of the courts were taken down in short hand by the reporters. No opinion appears to have been delivered by the court; only saying, "judgment affirmed." To ascertain the points actually presented and decided, recourse must be had to the argument of counsel. The point presented by the argument of the appellant's counsel was, "whether the court would give a rigid or liberal construction to the act;" he insisting that, though but one witness signed the deed, a liberal construction would allow him to prove by parol that another was actually present, was called on to witness the

deed, and did witness it. This position seems to have been denied by the adverse counsel. All the authorities cited by either were upon the single point, whether such parol evidence was admissible; and the head note of the reporter confines the decision to that single point. There is nothing, then, either in the decision itself, or in the report of it, which can make it conclusive as an authority on the question presented in this case.

3. It appears that the negroes had left Maryland before that decision was made, and that the petitioners in this case never were in that State. Can the State of Maryland pass a law, or her courts declare the law, so as to affect property beyond her jurisdiction? Suppose citizens of Alabama should go to Maryland, and there purchase slaves—slaves in fact under a proper construction of their laws—and bring them to this State; could the courts of Maryland so construe those laws as to set free all these slaves, and bind our courts to follow their construction? Or suppose, as in this case, a slave is legally emancipated in Maryland, under the proper construction of their existing laws, and is in fact a free man, when he is kidnapped, or comes voluntarily into Alabama; could the courts of Maryland, by an erroneous construction subsequently given to those laws, enslave him, and authorize a citizen of Maryland to come here and seize him? Or could the freesoil judges of Pennsylvania make a decision to-day, so construing their old statutes of 1700 on the subject of slavery as to set free all the slaves, with their descendants, that have been brought into the southern States for the last fifty or one hundred years?

4. The defendants are strangers to the deed, and cannot be heard to impeach it, although its attestation may be defective.—Smith v. Houston, 16 Ala. 111; Herbert v. Hanrick, 16 Ala. 599; 7 Gill & J. 96. They are shown to derive title from Molly Townsend, who, as to these petitioners, was a mere trespasser and wrong-doer, holding under no one.

5. The judgment of the Kentucky court, establishing Matilda's claim to freedom, is in the nature of a proceeding *in rem*, and binding on the whole world.—1 Greenl.

on Ev. § 525; Smith's Leading Cases, vol. 2, p. 85. But, regarding it only as a proceeding *in personam*, it is binding on the defendants, who are privies of the defendant in that suit.

WALKER, J.—The appellees claim freedom under a deed of manumission, made in the State of Maryland, in 1787. The deed attempts to provide a prospective emancipation, and is attested by only one witness. The law of Maryland, authorizing such emancipation, was a statute adopted in 1752, which was given in evidence. It is a question in this case, whether that act requires the attestation of two subscribing witnesses to a deed of prospective emancipation, or whether that requisition is confined to deeds, the operation of which is contemporaneous with their delivery. The decision of this question depends upon the construction of the statute.

The law given in evidence was construed by the court of appeals of the State of Maryland, in 1807, in the case of negro James v. Gaither, 2 Harris & Johns. R. 176. The decision in that case was introduced as defensive testimony in this cause by the appellant, and is a part of the record. To show that that decision should not influence the judgment of this court, in the construction of the Maryland statute, it is argued, that the *precise point* now in controversy was not decided, or in the mind of the court; that it was made long after the execution of the deed, and when the right of property in the maternal ancestor of the petitioners was exercised in another State; and that the decision is manifestly incorrect. We proceed to consider the points thus made in the order in which they are stated.

In negro James v. Gaither, *supra*, the sole defect in a deed of prospective emancipation was, that it was attested by only one witness. The county court, in which the petition was filed, sustained the deed. The general court, on appeal, reversed the judgment of the county court; and the court of appeals, on appeal from the general court, affirmed its decision without delivering an opinion. The report of the case contains a brief statement of the argu-

ments in the case. The argument for the appellant seems to present to the court only the point, that the statute required merely that two persons should witness the execution of the deed; not that they should subscribe their names to it as attesting witnesses. It was contended in the discussion of this case, that the only point decided, or in the mind of the court, was that made in argument. The result of that position would be, to take from judicial decisions, where there is no opinion, the authority of an adjudication upon all propositions which were too plain, or too well recognized by the bench and bar, to be questioned; and thus the universal and undisputed sanction of a legal principle would become a barrier to proof by judicial decisions of its existence. It better accords with reason to regard a judicial tribunal as asserting, and intending to assert, every proposition which is indispensable to the conclusion expressed, and necessarily involved in it; at least when the contrary does not appear. There was one subscribing witness to the deed in the case of negro James v. Gaither. If one subscribing witness was sufficient in the judgment of the court, an affirmance was impossible. The proposition that one subscribing witness was not sufficient, is necessarily involved in the conclusion expressed; and as nothing to the contrary appears, it must be regarded as decided by the court. That the counsel placed his argument upon the ground that the statute did not require the *two witnesses* who "*evidenced*" the execution of the deed to be *subscribing witnesses*, proves rather that the necessity of two witnesses was a recognized and conceded point of law in Maryland, than that the court passed over, without observing and deciding, the proposition which was directly and necessarily involved in the judgment given.

The effect of the Maryland decision was considered by the Virginia court of appeals, in the case of Thrift v. Hannah, 2 Leigh, 300. In that case, as in this, the validity of a deed of prospective emancipation, made in Maryland, and attested by one witness, was controverted; and the Maryland decision was presented as an authoritative exposition of the meaning of the statute. The court,

although it denied the correctness of the construction adopted in Maryland, yielded to the decision as an authoritative adjudication of the point, that two subscribing witnesses were necessary to sustain the deed. The supreme court of the United States seems to have taken the same view of the Maryland decision, in the case of Miller v. Herbert, 5 Howard, 72. We are thus, by adjudged cases, fortified in the conclusion, that the Maryland court of appeals has construed the statute as requiring two subscribing witnesses to a deed of prospective emancipation.

It is true, that the Maryland decision given in evidence was made about twenty years after the execution of the deed, and about three years after Matilda, the mother of one, and the grandmother of the other petitioners, had been carried to Kentucky; but these facts do not detract from the weight of the decision as evidence in the case. The validity of the deed made in 1787 is to be determined by the law of Maryland as it then existed. The statute was not necessarily all the law upon the subject. The construction placed upon the statute was also a matter of law; and it was permissible to show, as well the construction placed upon the statute, as the statute itself.—Walker v. Forbes, at the last term. If the decision made the law, as the statute does, it would be totally irrelevant to the case; because contracts must stand or fall, not by subsequent, but by existing law. Judicial opinions, however, do not make the law. Their office is simply to declare the law as it existed before. They are not, in themselves, law, but evidence of what the law is. There can be but one right construction of the statute. That construction was the same when the statute was adopted, as when the decision was made. The Maryland court of appeals simply declared that construction by the judgment which it gave, and is evidence of what is the proper construction. The construction, which the decision evidences, was the law from the adoption of the statute.

In the case from 2 Leigh, *supra*, the deed made before the Maryland decision was held void under its influence, notwithstanding the negroes, whose claim to emancipation

was affected by it, had been removed to Virginia about nine years before the decision was made. In that case, the following emphatic language was used: "The construction given to the law of Maryland by the decision of the court of that State puts the Maryland deed of emancipation out of the case." Chief Justice Marshall, in the case of Elmendorf v. Taylor, 10 Wheaton, said: "This court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial departments of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes; and therefore erect itself into a tribunal, which should correct such misunderstanding." In this last case, decisions of the Kentucky court of appeals, made long after the rights of the respective parties had attached, control the judgment of the supreme court of the United States. In Shelby v. Guy, 11 Wheaton, 367, it is remarked, that a fixed and received construction of the statutes of the several States, in their respective courts, makes in fact *a part of the statute law of the country.* There are many other decisions to the same effect, some of which we cite without comment.—Johnston v. S. W. R. R. Bank, 3 Strob. Eq. 263–300; McRae v. Mattoon, 13 Pick. 53; Sidney v. White, 12 Ala. 728; Raynham v. Canton, 3 Pick. 293; Mutual Ass. Co. v. Watts, 1 Wheat. 279–290; Polk v. Wendell, 4 Cranch, 87–98; McKeen v. DeLancy, 5 *ib.* 22; Gardner v. Collins, 2 Peters, 85; United States v. Morrison, 4 Peters, 124; Cathcart v. Robinson, 5 Peters, 264; Green v. Neal, 6 Peters, 291; Walker v. Forbes, at the last term; Davidson v. Sharp, 6 Iredell, 14; Inge v. Murphy, 10 Ala. 885; Peake v. Yeldell, 17 Ala. 136; Hanrick v. Andrews, 9 Porter, 9; American P. W. v. Lawrence, 3 Zabriskie, 590.

An examination of the facts in the cases above cited will show, that the courts have not denied the authority of decisions construing statutes, either because the decisions were made after the transactions which were passed upon occurred, or after the persons affected had emigrated to another State. The principle is, that by the *comitas gentium* the courts of the several States must be permitted to construe their own statutes; and it is founded in justice and reason. The courts of each State must be presumed best to understand all the circumstances which influence the judicial construction of its statutes.

The Maryland decision does not place an absurd or unreasonable construction upon the statute. The statute is "darkly and clumsily penned."—Thrift v. Hannah, *supra*. Its meaning is doubtful. It is one of those laws, which different minds might differently understand. This case, therefore, does not present an example of an unreasonable and absurd construction placed by the court of a State upon its statute; and we are not called upon to decide, and therefore do not decide, what weight should be allowed to such a decision.

From the decision which we have made upon the main question in this case it follows, that the petitioners are not free persons, unless the defendant is estopped by the judgment of the Kentucky court, in favor of the freedom of their maternal ancestor. Let it be conceded, as the evidence conduces to show, that the defendant here holds under Molly Townsend, who was the defendant in the Kentucky suit; and that the title was derived from her after the judgment in that suit; and the question, thus presented in the most favorable aspect for the petitioners, we are constrained to decide against them. If Molly Townsend herself were the defendant to this suit, she would not be estopped by the judgment. Estoppels must operate reciprocally. Molly Townsend would not be estopped, as to the question of the freedom of the child, by a judgment in favor of the mother, unless the child would have been estopped, if the judgment had been the other way. A judgment against a vendor or assignor, after the title has passed to the vendee or assignee, does

not operate as an estoppel against the latter. A foreclosure of a mortgage, in a suit against the mortgagor, does not operate against an assignee of the mortgagor by a previous assignment.—Crutchfield v. Hudson, 23 Ala. 303; Thomason v. Odum, at the last term; Cooper v. Martin, 1 Dana, 23; Starkie on Ev. 2 Part, 194; Adams v. Barnes, 17 Mass. 365; 3 Bacon's Abr. 549, *Evidence*, F. The same principle is applicable here. Grasey, who is the mother of the other petitioners, had derived freedom or slavery by birth from her mother, Matilda, before the proceedings were instituted in the Kentucky court; and her right to freedom could not be affected by a judgment against her mother in that case. As Grasey would not have been estopped by the judgment in that case, if adverse to her mother, so she cannot avail herself of the contrary judgment as an estoppel in her favor.

We are aware that the decision in the case of Shelton v. Barber, 2 Wash. 82, is susceptible of a construction which would place it in opposition to the conclusion above expressed; but we think we are sustained by principle, and we regard the decisions in Davis v. Wood, 1 Wheaton, 1; Davis v. Wood, 7 Cranch, 271; and Alexander v. Stakely, 7 S. & R. 299, as inconsistent with Shelton v. Barber, *supra*, and supporting the proposition we have laid down.

It results from what we have said, that, upon the facts before us, the petitioners are slaves. It is therefore unnecessary for us to consider the other questions argued.

The judgment of the court below is reversed, and the cause remanded.

JOHNSTON *vs.* SHAW.

[BILL IN EQUITY FOR DIVESTITURE OF TITLE TO LAND.]

1. *Where bill may be filed.*—Section 2875 of the Code authorizes a bill in chancery to be filed "in the district where the subject of the suit or any portion of the same is," only when all the defendants are non-residents.
2. *Objection to jurisdiction of court.*—If adult defendants answer, without objecting to the jurisdiction of the court in which the bill is filed, or if a decree *pro confesso* is entered against them for want of an answer, this amounts to a waiver of the want of jurisdiction; yet, where there are infant defendants, who answer by their guardian *ad litem*, the court may, *ex mero motu*, dismiss the bill for want of jurisdiction.

APPEAL from the Chancery Court of Greene.
Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by the appellant, against the heirs-at-law of Benjamin Dorman and Franklin Shaw, late partners, both deceased; and sought to obtain a divestiture of the legal title to a house and lot in the town of Greensboro', which the complainant and his late partner had purchased from the firm of Dorman & Shaw. The heirs of Shaw were non-residents; while the other defendants, two of whom were minors when the bill was filed, resided in Mobile. A guardian *ad litem* was appointed for the infant defendants, and filed a formal answer for them. Decrees *pro confesso* were entered against all the other defendants: against the residents, on personal service; and against the non-residents, on proof of publication. On final hearing, on pleadings and proof, the chancellor dismissed the bill for want of jurisdiction, on the ground that it was not filed in the proper district; and his decree is now assigned as error.

J. D. WEBB, and R. F. INGE, for the appellant, contended, 1st, that the statute gave the plaintiff, in such a case as this, an election to file his bill in the county in which the resident defendants resided, or in the county in which the land in controversy was situated; and, 2dly,

that the court could not, *ex mero motu*, dismiss the bill for want of jurisdiction, after decrees *pro confesso* had been entered and answers filed.

No counsel appeared for the appellees.

STONE, J.—Section 2875 of the Code defines the proper district in which chancery suits shall be brought, in most (if not all) the cases within the jurisdiction of that court. That section is subdivided into several clauses; and we think it is our duty to assign to each clause, except perhaps the second, a separate field of operation. This will lead to harmony of construction, prevent collision between the several provisions, and lay down a clear rule for each and every case as it may arise. The second clause is an exception to a general rule declared in the first clause.

Under this construction, we hold, that the expression, "in case of non-residents," must be understood as meaning, *in cases where all the defendants are non-residents.* The declared rule in such cases, which requires that the suit shall be brought "in the district where the subject of the suit, or any portion of the same, is," is *the rule* prescribed for cases in which all the defendants are non-residents, and has no application whatever to suits against two or more defendants, a part of whom are residents, and the others non-residents.

Under this rule, it is clear that this suit was not brought in the proper district, and the bill should have been dismissed, if either of the defendants had properly moved therefor. Had the chancellor authority to dismiss it, no one having applied for such order?

We concede, that in cases against adult defendants, a contempt in failing to answer, or an answer without raising the question of jurisdiction, would be regarded as a waiver of an objection like this.—Harrison v. Harrison, 20 Ala. 629, 647; Danl. Ch. Pr. 715; Byrd v. McDaniel, 26 Ala. 582; 2 Bouv. Bac. Abr. 618; Freeman v. McBroom, 11 Ala. 943; Br. Bank v. Rutledge, 13 Ala. 196. When, however, it appears on the face of the bill that the particular

court had not jurisdiction of the person of the defendant, such bill may be dismissed on motion.—Porter v. Worthington, 14 Ala. 584; Shrader v. Walker, 8 Ala. 244; Br. Bank v. Rutledge, 13 Ala. 196.

In the present case, there are infant defendants. True, their guardian *ad litem* has answered, without raising this objection; and there has been no motion to dismiss the bill. The rule is, however, that infants cannot forfeit their rights by waiver, and neither they, nor any other person, can make a valid consent for them, unless the consent be promotive of their interest.—1 Dan. Ch. Pr. 95, 215; 2 *ib.* 980; Wilkinson v. Parish, 3 Paige, 653; Johnson v. Farnsworth, 6 Ala. 443, 451.

In the case of Clark v. Gilmer, 28 Ala. 265, the record showed that five of the defendants were non-residents and infants. The copy of the order of publication, which the rule required to be forwarded to their mother, with whom they lived, was misdirected to Elizabeth, instead of Mary A. Lewis, her true name. We held the appointment of the guardian *ad litem* irregular, and, on that account, reversed the chancellor's decree. Speaking of this error, we said: "It is proper to say, that the error for which the decree is reversed, is one which escaped the notice of the solicitors and the chancellor, and was not even noticed by the counsel on the argument in this court. But, as it is an error to the prejudice of infants, and we see it on the record, and the assigment of errors is broad enough to embrace it, we cannot pass it over, nor allow the decree to stand."—Walker's Ch. 200; Sanford v. Granger, 12 Barb. Sup. Ct. 392.

The above extract is in point, to show that it is the duty of courts of chancery, *ex mero motu*, to grant relief to infants, which adults could only obtain on motion for that purpose.

The decree of the chancellor is affirmed.

ROBINSON'S ADM'RS *vs.* TIPTON'S ADM'R.

[ASSUMPSIT ON SPECIAL CONTRACT.]

1. *Sufficiency of complaint on contract within statute of frauds.*—In declaring on a contract which the statute of frauds requires should be in writing, it is not necessary to allege in the complaint that it was reduced to writing.
2. *Sufficiency of consideration of contract.*—A promise by the purchaser at sheriff's sale, to the defendant in execution, to resell the lands for the benefit of the latter, in consideration that he would not require the payment of the surplus of the purchaser's bid over the amount due on the execution until such resale could be had, is founded on a sufficient consideration.
3. *Competency of transferror as witness for transferree.*—Section 2290 of the Code, declaring the transferror, in an action on a contract, an incompetent witness for his transferree to prove the cause of action, does not apply to a case in which, on the revivor of the suit in the name of the original plaintiff's administrator, a distributee of the estate, having released his interest to the administrator, is offered as a witness to prove the contract declared on.
4. *Competency of distributee as witness for administrator.*—A distributee may render himself a competent witness for the administrator of the estate, by the execution of a release of all his interest in the estate.
5. *Competency of witness as affected by declarations of interest.*—The declaration of the plaintiff, made after the commencement of the suit, in reply to a proposition of compromise, "that whatever was coming out of the suit belonged to his son, and that he could make no agreement about it without seeing his son," is not sufficient to render the son an incompetent witness for the plaintiff's administrator, in whose name the action had been revived, when it is shown that he has released to the administrator all his interest in the suit.
6. *Construction of order on sheriff for payment of money.*—A written order by the defendant in execution, directing the sheriff to pay to his son whatever surplus of the proceeds of the sale of his land might remain after paying all executions against him; not expressing any consideration, nor shown to have been given on valuable consideration,—is a mere authority to the son to receive the money, and not a transfer or assignment of it to him.
7. *General objection to evidence.*—A general objection to evidence, of which a part is legal, may be overruled entirely.
8. *Proof of sale of land.*—A witness may testify to the fact, "that the said W. R. *sold* him the said land for $2,000," without producing the written evidence of the sale, or accounting for its absence.
9. *Waiver of objection to revivor of suit.*—When an administrator *de bonis non* is appointed during the pendency of a suit, which was brought originally by the intestate in his life-time, and afterwards revived in the name of his administrator in chief; if the defendant makes no objection in the primary court to the right of the administrator in chief to proceed to judgment, he cannot raise the objection on error.
10. *Practice in appellate court.*—In civil cases, the practice of the appellate court is, to decide only the points presented by those assignments of error on which counsel insist in argument.

APPEAL from the Circuit Court of Madison.
Tried before the Hon. THOMAS A. WALKER.

THIS action was brought by Samuel Tipton, against the administrators of William Robinson, deceased; was commenced on the 26th April, 1853; was revived, on the death of the plaintiff, in the name of George W. Carmichael, as his administrator; and was founded on a special contract between plaintiff and defendants' intestate, made in August, 1839, which is thus stated in the first count of the amended complaint: "On the 20th February, 1839, one Andrew J. Rice recovered a judgment against Samuel Tipton and others, in the county court of Madison, for the sum of $455 debt, $23 42 damages, and $19 22 costs of suit; on which judgment an execution was issued, which was levied by the sheriff on a tract of land belonging to plaintiff; which lands were sold by said sheriff on the —— day of August, 1839, to satisfy said execution; at which sale defendants' intestate, William Robinson, became the purchaser, for the sum of $1700; and said Robinson then and there agreed with plaintiff, that if plaintiff could not require him (said Robinson) then to pay plaintiff the sum of $1150, the excess of said sum of $1700 remaining after satisfying said execution, until he (said Robinson) could resell said lands, then he (said Robinson) would make a resale of said lands, and, after reimbursing himself the amount paid out in satisfaction of said execution, with the interest thereon, would pay plaintiff the residue of whatever sum said lands might bring at the resale." The lands were resold by Robinson, on the 6th October, 1848, for $2,000; and this action was brought to recover the balance due to plaintiff on the resale under said contract.

The first count in the amended complaint set out the contract, as above stated, and then averred the resale of the lands, and Robinson's failure and refusal to pay plaintiff the sum of $1200, "the amount remaining after reimbursing him the full amount paid out in satisfaction of said execution, with the interest thereon." The second count claimed the sum of $1200, with interest thereon

from the 4th August, 1839, as the excess of the defendants' intestate's bid at the sheriff's sale over and above the amount due on the execution. The third count was, in substance, the same as the first, except that it claimed the rents and profits of the lands received by the defendant up to the time of the resale; and the fourth count was in the common form for money had and received by said Robinson, on the 6th October, 1848, to and for the plaintiff's use. The defendants demurred to the first and third counts, on the grounds, 1st, "that the cause of action therein set out is obnoxious to the statute of frauds;" and, 2d, "that said promise is not averred to have been in writing, or upon any consideration." The court overruled the demurrer, and the defendants then pleaded, "the general issue, payment and set-off, in short by consent, with leave to give in evidence any special matter of defense;" and on these pleas issue was joined.

On the trial, as appears from the bill of exceptions, the plaintiff offered to read in evidence the deposition of Shadrach S. Tipton, who was a son of Samuel Tipton, the original plaintiff. The defendants objected to the admission of the deposition, on the ground that the witness was incompetent from interest, and, in support of their objection, introduced Fleming Jordan as a witness, who testified, "that said Samuel Tipton died in 1854, and that said Shadrach was one of his children; that he had an interview with Samuel Tipton, some time after the institution of this suit, at the request of the defendants, to see if he (Tipton) would not compromise the suit; and that said Samuel replied, 'that whatever was coming out of the suit belonged to his son Shadrach, who was in Mississippi, and that he could make no agreement about it without seeing said Shadrach.' To remove this objection to the deposition, the plaintiff then read, after proof of its execution, a release from said Shadrach Tipton to *David S. Nowlin*, as administrator *de bonis non* of said Samuel Tipton, of all his distributive interest in his father's estate; which release was dated the 19th January, 1856. The defendants then read, after proving its execution, another

release by said Shadrach, dated the 27th January, 1855, which recited a consideration of one hundred dollars, and the material portion of which was as follows: "I do hereby, for myself," &c., "release and forever discharge George Carmichael, the administrator, or any other administrator that may be hereafter appointed, of the estate of said Samuel Tipton, of all and singular of my distributive share in said estate, and also from all debts, demands, actions, or causes of action, which I now have, or which may result from the existing state of things, both in law or equity; also, his heirs, administrators and executors, from any liability to me, in any manner whatever; and as to my distributive share of said estate, I hereby, for myself, my heirs and assigns, relinquish to my brothers and sisters, and their heirs, forever, to receive, have, and hold the same." The defendants "thereupon urged the exclusion of said deposition, on the ground that the execution of this paper by the witness operated as a transfer of his interest as distributee, and rendered him incompetent under section 2290 of the Code; also, on the ground that he had an interest, other than as distributee, which was not released at all." The court overruled the objections, and admitted the deposition; to which the defendants excepted.

The defendants afterwards proved "that Samuel Tipton had repeatedly said, that he had gotten nothing for his land—that his son Shadrach had got the money, or that it had gone to pay Shadrach's debts;" and also offered in evidence, after proof of its execution, an order from Samuel Tipton to C. D. Kavanaugh, sheriff of Madison county, dated and executed on the 4th August, 1839, in these words: "Sir—You will please apply the proceeds of the sale of my lands to the payment of all the executions against me, as well those from justices of the peace, as those from courts of record; and if any balance shall remain after paying them, please pay it to my son Shadrach." This order was drawn in the presence of Benjamin S. Tipton, was accepted by said Kavanaugh, and was endorsed by said Shadrach to William Robinson, who took possession of it; "but there was no proof of what

else passed when it was drawn, except that said Benjamin S. Tipton saw no money pass from said Robinson to Shadrach or any one else, and that all this occurred the day after the sale." After the introduction of this evidence, the defendants again moved the court to exclude from the jury the deposition of said Shadrach Tipton, on the ground of incompetency from interest; but the court overruled their objection, and they excepted.

The defendants also objected "to the competency and admissibility" of this witness' answer to the 6th interrogatory; but the objection was overruled, and they excepted. This answer was as follows: "William Robinson came to me, in the town of Lowesville, now Maysville, in June or July, 1839, and inquired what arrangement my father had made to pay off the execution in favor of A. G. Rice. My reply was, that he had made none, and that I expected the land would have to be sold. Robinson then made the following proposition to me: That if my father could not raise the money to pay off said execution, he would bid off the land, when sold, and pay off the execution, and would charge my father eight per cent. for the use of his money till it should be paid; and he further agreed to rent out the land, and to allow my father all the benefit from the same, after paying himself, or sell the land, allowing my father or myself the privilege to sell it. I advised my father to accept said proposition; which he did. He repeated the same to my father a few days afterwards, in my presence. It was distinctly understood between them, that my father was to have the entire benefit of the rent and sale of said land, after paying the advance above spoken of."

The plaintiff introduced one Robert Freeman as a witness, "and offered to prove by him that, in 1848, said William Robinson sold him the said lands, for $2,000, in two payments; one half of which he paid, and the other half he made arrangements with J. C. Bradley to pay after the death of said Robinson." The defendants "objected to the witness proving his purchase of said lands by parol, when there was higher and better evidence of it;

but the court overruled the objection, and the evidence went to the jury."

The defendants asked the court to instruct the jury, "that if they believed the order in evidence, with the endorsement thereon, to be genuine, then the right to the money under the special contract, if there was a special contract, was transferred to Shadrach Tipton, and the possession of the order by William Robinson is *prima-facie* evidence that he settled with Shadrach Tipton." The court gave this charge, but added, "that this *prima-facie* evidence that Robinson had paid and settled the order is susceptible of being rebutted and explained; that the jury must look to all the proof in the case, and if they are satisfied from the proof that Robinson had not paid the overplus to Shadrach Tipton, then the order was no defense." To this qualification of the charge the defendants excepted.

The defendants afterwards moved in arrest of judgment, on the ground that the presiding judge had no power to hold that term of the court; which motion was overruled.

The assignments of error embrace all the rulings of the court above stated; and there is an additional assignment, "that the court erred in rendering the judgment in favor of Carmichael, as administrator, when the record shows that Nowlin had become the administrator."

ROBINSON & JONES, for appellants, made these points:

I. The first and third counts of the amended complaint were obnoxious to each of the objections specified in the demurrer.

1. Each of these counts asserts that Robinson bought the land at execution sale, and afterwards contracted to resell it, and to pay the proceeds to Tipton after reimbursing himself. No stipulation between Robinson and Tipton before the sale is alleged. The land became Robinson's by his purchase at the execution sale; and the agreement to resell, not being in writing, was void under the statute of frauds.—Lathrop v. Hoyt, 7 Barb. 59; Riddle v. Brown, 20 Ala. 412; Van Alstine v. Wimple,

5 Cowen, 162; Hall v. Shultz, 4 Johns. 240; Sherrill v. Crosby, 14 Johns. 358; 2 Rich. Eq. 16. Whatever may have been the rule of law, prior to the adoption of the Code, as to the necessity of averring in the declaration that the contract was reduced to writing, such an averment is now made necessary, by the statutory provisions (Code, §§ 2227–30) on the subject of pleading.

2. The contract set out in each count, but more particularly that averred in the third count, is void for want of a sufficient consideration. The execution sale was made in 1839, before the passage of the statute allowing redemption in such cases. By the sale, Tipton's rights in the land ceased *in toto*, and the land became Robinson's absolutely; and Robinson or the sheriff owed Tipton only a sum of money. The stipulations in regard to the resale, then, are to be viewed as if they were made in reference to any other piece of Robinson's lands, and are purely voluntary.—Van Alstine v. Wimple, 5 Cowen, 162. The agreement that Robinson should not be required to pay the balance of his bid at the sheriff's sale, until the land was resold, is no legal consideration, not being obligatory on either party. Tipton ran no risk of losing by such an arrangement, nor could Robinson have gained anything. The land was to be resold at a profit: on no other principle could a resale be desired. No time was fixed for Robinson to sell; nor could he sell for less, at Tipton's risk. Tipton was to have, at all events, the amount of the excess at the first sale, with interest. All above that was a gratuitous promise by Robinson, and cannot be recovered. Tipton could not have forced Robinson to sell, nor could Robinson have forced him to defer a suit for the money actually due. As to gratuitous promises, see the following cases: Duncan v. Hall, 9 Ala. 129; Files v. McLeod, 14 Ala. 611; Leverich & Co. v. Bates, 6 Ala. 480; Barron v. Vandvert, 13 Ala. 232; Pearson & Fant v. Thompson, 15 Ala. 700; Forward v. Armistead, 12 Ala. 124; Sawyer v. Hill, 12 Ala. 575; McCaleb v. Price, 12 Ala. 753; Kirksey v. Kirksey, 8 Ala. 131.

II. The deposition of Shadrach S. Tipton ought to have

been excluded on account of his incompetency from interest.

1. Being a distributee of the estate of Samuel Tipton, a judgment in favor of the administrator would be evidence for him on the settlement of the administration; consequently, he is rendered incompetent by section 2302 of the Code. Moreover, the proof by Jordan, "that whatever was coming out of the suit" belonged to the witness, would enable him to recover from the plaintiff whatever amount might be recovered in this suit; and the judgment would be evidence for him, to establish the amount of the recovery.—Code, § 2302; 8 Mass. 487; 1 Stark. Ev. 125. In the third place, the order drawn by Samuel Tipton on the sheriff, in favor of the witness, was an additional proof of his interest.

2. The competency of the witness was not restored by the release to Nowlin, on which the plaintiff relied. The suit was in the name of Carmichael, as administrator; and there is nothing in the record, outside of this release, to show that Carmichael had ceased to be administrator, or that Nowlin had been appointed. The release is the act of the witness himself: its introduction by the plaintiff might bind him, but could not bind the defendants in this suit. The witness, being shown to be *prima facie* incompetent by independent testimony, could not restore his competency by his own evidence.—27 Ala. 217. The release, moreover, affects only his interest as a distributee of his father's estate; leaving him still incompetent on account of his individual interest, as proved by Jordan.

3. The interest of this witness, whether of one character or the other, could not be released, either under the Code, or under the previous law. The claim in suit is a chose in action.—Magee v. Toland, 8 Porter, 36; Goodwin v. Lloyd, 8 Porter, 237. Samuel Tipton could not have transferred it, and made himself a competent witness for his transferree.—8 Ala. 846; 15 Ala. 618. Section 2290 of the Code would render him an incompetent witness for his transferree, whether the transfer was made before or after suit brought. The death of Samuel Tipton did not change the character of the action, but his interest therein

then became the property of his children. Succeeding to his rights, the children can do nothing which he could not have done; nor can each one, acting separately for himself, do what all conjointly cannot. All, acting together, could not transfer their entire interest to another, and become competent witnesses for their transferree; nor can any one of them, transferring his separate interest, render himself competent to testify for his transferree. Whether the instrument be regarded as a release, or as a transfer, its effect is the same—transferring to another the interest which was in the witness; and is equally within the spirit and meaning of the statute.—11 Ala. 249; 8 Porter, 232; 7 Ala. 553; 10 Ala. 901. Nor can it make any difference in the application of the principle, that the instrument transferred the entire interest of the witness in his father's estate: his interest in the claim in suit must necessarily have passed by it. Nor would the case be altered, if it were conceded that the release was to the administrator individually, for it would still be a transfer of an interest in this chose in action: it would be vesting in him a beneficial interest which he did not before possess, and the witness would be testifying in support of that interest.

4. An interest of this kind cannot be released, except to the defendants. A release operates by way of discharging the releasee from some liability resting on him, or from accountability for something in his possession.—2 Bouv. Law Dic. 338. The witness, then, could not release to his co-distributees, who were under no accountability to him, and had nothing in their possession in which he had an interest; nor could he release the administrator, who was not liable for this debt, and would not be if it were never recovered. Where an administrator is the party defendant, a distributee may, possibly, release to him, and render himself a competent witness; but, where the administrator is the actor, and the suit is on a contract, the distributee cannot, by release, make himself a competent witness to support the interest transferred by him. All the decisions of this court are reconcilable with this principle, with the single exception of Herndon v. Givens,

19 Ala. 313, which, it is submitted, is wrong on principle, and not applicable as an authority under the Code.

5. Whatever may be the construction and effect of this instrument, the instrument executed by the witness one year before, transferring to his brothers and sisters, for valuable consideration, all his distributive interest in the estate, which is unquestionably a *transfer*, rendered him incompetent under the Code, and strictly within the principles laid down in the following cases: Maury v. Mason, 8 Porter, 232; Williams v. Temple, 6 Ala. 656; Powell v. Powell, 7 Ala. 584; S. C., 10 Ala. 901; Locke v. Noland, 11 Ala. 249; Scales v. Desha, Sheppard & Co., 16 Ala. 311.

III. The answer of this witness to the 6th interrogatory ought to have been excluded; because, 1st, the contract detailed was materially variant from that declared on; and, 2dly, because the contract detailed was obnoxious to the statute of frauds.

IV. The evidence of Freeman, to which objection was made, ought not to have been received. Parol proof was only admissible after the absence of the deed was properly accounted for.—Hussey v. Roquemore, 27 Ala. 281; 1 Greenl. Ev. § 86.

V. The charge given by the court, in qualification of the charge asked, is indefensible as a legal proposition; and, as applicable to the facts, was highly injurious to the defendants. The plaintiff's demand comprised three items, though all blended in one: 1st, the $1150, overplus at the sheriff's sale; 2d, the profits made by the resale; and, 3d, the rents accruing between the two sales. The charge of the court asserted, in effect, that the drawing, endorsing and accepting of Tipton's order on Kavanaugh, without its payment, was no defense against either one of these separate demands. By the drawing and accepting of the order, the right to the money was transferred out of Samuel Tipton.—Story on Bills, § 13; 21 Ala. 167; 27 Ala. 399. His administrator, then, could not recover it, though no consideration ever passed from Robinson to Shadrach Tipton. If the transaction was fair, the plaintiff was bound by it; if not, the courts will not aid him. The

court withdrew these considerations from the jury, and made the effect of the order as a defense depend solely on the payment of it by Robinson.

WALKER, CABANISS & BRICKELL, *contra*.—1. The demurrer to the complaint was not well taken, on either one of the specified grounds. Conceding that the contract declared on was within the statute of frauds, it was not necessary to aver in the complaint that it was reduced to writing.—1 Chitty's Pleadings, 221, 303; 6 Ala. 694; 8 Ala. 312; 9 Ala. 270; 10 Ala. 244; 4 Greenl. 1. The sufficiency of the consideration, which consisted in the postponement of the day of payment for the surplus of the purchaser's bid above the amount due on the execution, is unquestionable; being both a benefit to Robinson, and an injury to Tipton.

2. Shadrach Tipton was a competent witness for the plaintiff. The release of his interest as a distributee made him a competent witness for the administrator, so far as that interest was concerned.—Herndon v. Givens, 19 Ala. 317; Hall v. Alexander, 9 Ala. 219; Scales v. Desha, Sheppard & Co., 16 Ala. 308. The plaintiff's declaration, as proved by Jordan, that "whatever was coming out of the suit belonged" to the witness, was not sufficient to establish a disqualifying interest in him. Williams v. Thorp, 8 Cowen, 501; Densler v. Edwards, 5 Ala. 31; Sibley v. Lumbert, 30 Maine, 253; Cole v. Cole, 33 Maine, 542; Ten Eyck v. Bell, 5 Wendell, 57. If, however, the witness had a disqualifying interest at common law, he was nevertheless competent under section 2302 of the Code; for the record of the judgment in the case would not be competent evidence for or against him in another suit, to establish any other fact than its own rendition, of which it would be competent evidence against all the world. Considering the release executed by the witness as a transfer, it would not render him incompetent under section 2290 of the Code; because the plaintiff does not claim as his transferree, nor seek to enforce a contract originally made with him. The instrument, however, is not a transfer, but a release; con-

sequently, section 2290 of the Code does not apply to the case.

3. The objection to the answer of this witness to the 6th interrogatory was properly overruled. The contract proved by him was not obnoxious to the statute of frauds. Hess v. Fox, 10 Wendell, 437; Musick v. Richardson, 6 Mo. 171; Hall v. Hall, 8 N. H. 129; Massey v. Holland, 3 Iredell, 197. If the contract were within the statute, plaintiff could nevertheless recover the excess of the purchaser's bid at the sale, after satisfying the execution; and proof of the contract was admissible, not with a view to its enforcement, but to establish a state of facts from which the law would imply a promise to pay that excess. King v. Brown, 2 Hill's (N. Y.) R. 486; Myer v. Fisher, 15 Johns. 503; Gray v. Hill, 21 E. C. L. 479; 15 *ib.* 39; 5 N. H. 130; 3 Wendell, 219. The question of variance cannot be raised under a general objection. If a specific objection had been raised on that ground, it might have been remedied.—6 Barb. 330; 1 N. J. 562; 2 Hill, (N. Y.) 603.

4. The objection to Freeman's evidence was untenable. The record does not show the existence of any other evidence of the facts to which he testified; and if a deed had been shown to exist, the parol evidence would have been admissible.—4 Phil. Ev. (C. & H.'s Notes,) 399.

5. The order given in evidence was not urged as a bar or defense to the suit, except as evidence of the payment of the demand. The court charged the jury, at the request of the defendants, that the possession of the order by Robinson was presumptive evidence that he had paid it; and the qualification added to the charge only explained the meaning of presumptive evidence. The order did not constitute a defense to the action: it was but an authority to the sheriff to pay the money to Shadrach, and not an assignment or transfer of the money to the latter; and full effect was given to it by the charge.

6. The mistake of the clerk, in stating Carmichael as plaintiff, instead of Nowlin, in the margin of the judgment entry, is amendable by other parts of the record.—Patterson v. Burnett, 6 Ala. 844.

RICE, C. J.—We shall not notice the complaint originally filed, because, without any decision as to its sufficiency, an amended complaint was filed, upon which the action of the court below here complained of was had.

The demurrer to the first and third counts of the amended complaint was overruled. By section 2253 of the Code, no objection can be taken or allowed, which is not distinctly stated in the demurrer. The only objections specified in the demurrer are, 1st, that the cause of action set out in these counts is obnoxious to the statute of frauds; and, 2d, that "said promise is not averred to have been in writing, or upon any consideration."

It is settled, that, although it may be necessary to prove an agreement which is declared on to have been in writing, it is not necessary to allege in the complaint that it was in writing. If the agreement be one which the statute of frauds requires to be in writing, the court will not assume it to be verbal, merely because the complaint does not expressly state it to be in writing.—Blick v. Briggs, 6 Ala. R. 687.

2. From the counts demurred to it appears, that certain land of the original plaintiff in this action (Samuel Tipton) was sold in 1839 at sheriff's sale; that the defendants' intestate (William Robinson) was the purchaser at that sale; and that the amount of his bid was greater than the execution claims. The surplus which remained after the payment of the execution claims was clearly the property of the said Samuel Tipton, whether it was in the hands of the sheriff, or in the hands of the purchaser. Baylor v. Scott, 2 Porter's Rep. 315. The said Samuel had the right to relieve the purchaser from the payment of this surplus to the sheriff. Unless he did relieve him, the purchaser was legally liable for the payment of the whole amount of his bid, including this surplus, *without any delay*. If he did relieve him from the immediate payment of this surplus, and agreed to take his chance for compensation in another way, and upon the occurrence of a subsequent event, (to-wit, the re-sale of the land,) as alleged and set forth in the counts demurred to; and, in consideration thereof, the defendants' intestate (the

purchaser) made the promise as alleged in those counts, it is beyond all doubt, that the consideration for the promise is sufficient.—The suspension or forbearance of a man's legal or equitable rights forms a foundation for an undertaking.—Addison on Con. (edition of 1857,) 20, 21, and notes.

These views bring us to the conclusion, that the objections specified in the demurrer to the first and third counts are not fatal to those counts; and that, therefore, there was no error in overruling the demurrer.

3. The original plaintiff having died, intestate, after the commencement of this suit, and the suit having been revived in favor of his administrator, the question was raised on the trial, whether Shadrach Tipton, a son of said Samuel, and a distributee of his estate, was a competent witness for the administrator. It is contended, that he is incompetent, not only because he is a distributee, but also because he is otherwise interested in the event of this suit, and because he belongs to the class of witnesses excluded by section 2290 of the Code, which provides, that when a suit is brought by *the transferree of any contract, express or implied*, "the transferror, or party with whom the contract was *originally* made, is not a competent witness for the plaintiff, to prove *the cause of action*," &c.

To a correct decision of this question of competency, a correct understanding of the complaint is essential. The second count is framed to recover *the surplus* of the amount at which the defendants' intestate became the purchaser of the land of the said Samuel Tipton at the sheriff's sale; the first and third counts are framed to recover *the surplus* of the proceeds of the re-sale of the land by the defendants' intestate, which remained after reimbursing him what he had paid for it; and the only other count (the fourth) is for money had and received by the defendants' intestate, to and for the use of the said Samuel. It does not appear from the complaint, nor from the evidence in the record, that the present suit was brought by the said Samuel Tipton as "the transferree of any contract, express or implied," "*originally* made" with the said Shadrach Tipton; nor that any such contract, or

the transfer of any such contract, by the said Shadrach to the said Samuel, was alleged, proved, or urged as a ground of recovery, or "cause of action," in favor of the plaintiff. We hold, therefore, that section 2290 of the Code has no application to the question of the competency of said Shadrach, and cannot authorize his exclusion.

4. He is not presented by this record in the attitude of the transferror of a *chose in action*, offered by the transferree to establish by his own testimony the title, cause of action, or demand which he had transferred. If he had been presented in such attitude, his incompetency would be manifest, and could not be removed by a release, under the rule recognized in Houston v. Pruitt, 8 Ala. R. 846; Powell v. Powell, 10 *ib.* 900; Locke v. Noland, 11 *ib.* 249. But the reason upon which that rule rests is, that to permit the transferror of a chose in action to establish the debt by his own testimony, in a suit for its recovery by the transferree, "would be to introduce the evils of champerty and maintenance."—Houston v. Pruitt, *supra;* Bell v. Smith, 5 Bar. & Cress. 188. That reason does not exist in the case now under consideration; and the rule, therefore, does not apply. Here, the suit was brought by the intestate in his lifetime; the title, or cause of action, is not created by, nor derived from, the distributee who is offered as a witness; but exists independently of any transfer which he, as a mere distributee, may make, and accrued to the intestate in his lifetime, by virtue of a contract made with the defendants' intestate, and passed by operation of law to the present plaintiff, who is prosecuting the suit in his capacity of administrator. The distributee has executed two releases since the death of the original plaintiff, and by them has effectually parted with and removed all interest which he ever had or ever can have as a distributee. After the execution of these releases, he is offered as a witness for the administrator of his father; but is not offered to prove any title, cause of action, or demand, derived from him by transfer or otherwise. To admit him to testify under such circumstances, and in such a case, will not be to introduce any of the

evils of champerty or maintenance; and although the degree of credit to which he is entitled may be a debatable question, we are satisfied that the releases executed by him removed all objection to his competency, founded on the fact that he was a distributee.—Scales v. Desha, 16 Ala. R. 308; Herndon v. Givens, 19 Ala. R. 313.

5. We now direct our attention to the objection founded on the declaration of said Samuel Tipton to Jordan, made after this suit was commenced, "that whatever was coming out of the suit belonged to his son Shadrach S. Tipton, who was in Mississippi, and that he could make no arrangement without seeing him." It is a settled rule, that the competency of a witness is always presumed, until the contrary is proved.—Densler v. Edwards, 5 Ala. R. 31. When such a declaration as the one above stated is relied on to prove incompetency, it is not to be taken most strongly against the party making it; but, if with equal reason it admits of two constructions, one of which renders the witness incompetent, and the other does not, the latter ought to be adopted. Looking to the circumstances under which the declaration was made, we think as reasonable a construction as can be placed on it, is, that the father meant by it that he had promised to pay to his son whatever he might recover and receive in the suit; and therefore regarded "whatever was coming out" of it as belonging to his son. Suppose the father had made such promise, it would have conferred on the son the right to claim the proceeds of the suit from the father, or his personal representative, when received by one of them. But from such a demand or cause of action, as well as from all other "debts, demands, actions, or causes of action," which the son had on the 27th January, 1855, or which might "result from" the state of things then existing, the then administrator of the father, and every after appointed administrator, was released and discharged by the release executed by the son on the 27th January, 1855. That release removes the objection to the competency of the son, founded on the declaration made by the father to Jordan.

6. The next matter for consideration is, the order by

which the father directs the sheriff to pay to his son, Shadrach, the balance of the proceeds of the sale of the land of the father by the sheriff, which might remain after paying all the executions against him. That order contains no words of transfer or assignment, and does not purport to be given, and is not shown to be given, for any valuable consideration. "The word *pay*, in the order, though generally a word of transfer, was not used in that sense." The circumstances, that it was drawn on the sheriff, as sheriff, and for no certain sum, but for an unknown and unascertained balance of the proceeds of a sale by the sheriff; and that it was drawn by a father, and contains words which naturally import a mere direction to the officer to pay to the son, and a mere authority to the son to receive from the officer,—concur to show that the order is rather an authority to pay, than a transfer, or an assignment.—Carrique v. Sidebottom, 3 Metc. R. 297; Clayton v. Fawcett, 2 Leigh's R. 19. *The order*, therefore, does not show any interest in the said Shadrach; and if unpaid, was "no defense." There was no error in overruling the objection to the competency of said Shadrach, nor in the charge of the court excepted to by defendant.

7. That part of the answer of said Shadrach, which was objected to by the defendant, embraces some legal evidence—to-wit, the declarations of the defendants' intestate in relation to the material matter in controversy in this suit. It is impossible to say that those declarations shed no light on the matters in issue, and that they are irrelevant.—Rutherford v. McIver, 21 Ala. R. 750. As the objection embraced some legal evidence, there was no error in overruling it.—McCargo v. Crutcher, 27 Ala. 171.

8. There was no error in refusing to exclude the statement by the witness Freeman, of *the fact* that "the said William Robinson sold him the said land for two thousand dollars." Whether that statement was *sufficient* evidence of the sale, is not the question raised. Whether it was sufficient or not, it was *admissible;* and that is all that the court decided in relation to it.—4 Phil. Ev. (C. & H.'s Notes,) 399.

9. No question was raised in the court below as to the

right of the administrator in chief of Samuel Tipton to prosecute the suit to final judgment, notwithstanding an administrator *de bonis non* had been appointed after the administrator in chief had become a party plaintiff to the suit. If the question had been raised in the court below, and had been decided against the right of the administrator in chief to have the judgment rendered in his favor, the matter might have been arranged without prejudice to any one, by making the administrator *de bonis non* the party plaintiff.—Code, § 1925. By not raising the question below, the defendant has lost his right to make it here.

10. The overruling of the motion in arrest of judgment, is assigned for error, but is not insisted on in the argument for the appellant. We therefore do not feel bound, under our practice, to express any opinion on it. But if it were insisted on, the only ground upon which the motion was placed, seems to be covered by the case of Spradling v. The State, 17 Ala. R. 440.

The judgment of the court below is affirmed.

BLISS *vs.* ANDERSON.

[BILL IN EQUITY BY STOCKHOLDER AGAINST OFFICERS OF INCORPORATED INSURANCE COMPANY.]

1. *When stockholder in private corporation may come into equity.*—A stockholder in an incorporated insurance company may file a bill in chancery, to restrain the officers of the company from the commission of an unauthorized act, which will not only amount to a forfeiture of its charter, but also subject the company to heavy fines and penalties.
2. *Construction of charter of Gainesville Insurance Company.*—The charter of the Gainesville Insurance Company, authorizing the company to receive money on deposit, "and to give acknowledgments for deposits in such manner and form as they may deem convenient and necessary to transact such business," (Session Acts 1855–6, p. ,) does not authorize the company to issue certificates of deposit to circulate as money, and with the intent that they shall so circulate.

3. *Sufficiency of allegations of bill.*—An averment, that the board of directors adopted certain engraved forms of certificates of deposit, "which show on their face that they are intended to pass from hand to hand as money," is not, on demurrer, a sufficient allegation of the intent that such certificates shall so circulate, although they show on their face that they were intended to subserve the purposes of money.

APPEAL from the Chancery Court of Sumter.
Heard before the Hon. WADE KEYES.

THIS bill was filed by the appellee, as one of the stockholders of the Gainesville Insurance Company, against the president and directors thereof, alleging that said company was incorporated by an act of the general assembly of this State, approved on the 22d January, 1856, and was organized under the provisions of its charter, by the subscription of the requisite amount of stock, and the election of president and directors; "that on the 31st October, 1856, said directors passed a resolution, to the effect that certain engraved forms of certificates of deposit, in denominations of one, two and three dollars, should be used as acknowledgments of deposits with said company;" "that the engraved forms referred to in said resolution are identical with those attached" to the bill as exhibits, "and show upon their face that they are intended to pass from hand to hand as money, or in lieu of money;" "that said resolution, in effect, authorizes the president and secretary of said company to issue said certificates, upon actual, *bona-fide* deposits with said company, by inserting the name of the depositors in the blank left for that purpose, and by the said president and secretary signing the same;" "that the said directors design that they shall be so issued, unless restrained from doing so by an injunction;" "that inasmuch as said certificates show on their face that they are intended to pass from hand to hand as money, or in lieu of money, said directors have no authority to use them, and put them out as acknowledgments to any person of an actual, *bona-fide* deposit by him with said company;" "that the charter of the company confers no power to do so, and if it does, it is, to that extent, violative of the constitution of the State;" and "that if said directors, or the officers of said

company by their authority, do so use them and put them out, it will occasion a forfeiture of the charter of said company under sections 935, 936, and 2651 of the Code of Alabama, or subject said company to losses and penalties, to the injury of complainant as one of its stockholders." The bill prayed an injunction to prevent the issue of the certificates, and added the general prayer for other and further relief.

The original exhibits to the bill are attached as exhibits to the transcript. It is impossible to give a *fac-simile* of the engraved forms of certificates of deposit referred to. An accurate description of them, which is sufficient to an understanding of the case, is given in the opinion of the court. The chancellor overruled a demurrer to the bill for want of equity, and, the defendants declining to plead or answer, ordered the bill to be taken as confessed; and his decree is now assigned as error.

JNO. A. ELMORE, and S. F. HALE, for appellants.—1. The certificates do not show on their face that they were intended to circulate as money, or to answer that purpose; and there is no such averment in the bill.

2. Unless such intent appeared on the face of the certificates, the court could not, without other proof, pronounce that such was the intent with which they were given. Crocheron v. Br. Bk. at Montgomery, 5 Ala. 251; Whetstone v. Br. Bk. at Montgomery, 9 Ala. 875.

3. The certificates show on their face that they are negotiable instruments, the issue of which was authorized by the charter of the company.

4. The company had express power to give certificates of deposit; the manner and form of which were not prescribed, but were left discretionary with the company.

5. If the effect of a particular manner and form were the necessary result and consequence of such manner and form, then this effect was as much a part of the grant as were the manner and form.

6. The manner and form of certificates of deposit are not usually noticed in a charter. When they are mentioned, it must be for some purpose, which, when ascer-

tained, is the legislative grant—the substance of the power intended to be given.

7. If certificates had been issued, payable alone to the depositor's order endorsed on them, no one would for a moment doubt the authority of the company to do so under the express power to give certificates; and such instrument, if endorsed by the depositor, would have all the elements of negotiability, and pass as readily from hand to hand as a bill of exchange or bank-check. If such instrument were presented to the company, and paid, the risk of the genuineness of the endorsement would be on the company. The manner and form of the certificates became, therefore, a matter of importance to the company in the transaction of "such business;" and they had the right to issue them in such form as would exonerate themselves from this risk, by discharging them on payment to the bearer.

8. The intention of an action must be judged by its necessary consequences. The legislature cannot be presumed ignorant of the character of a certificate of deposit, or of the fact that, like bank-checks, bills of exchange, and negotiable notes, it forms part of the general circulating medium of the country, and indeed, in large transactions, much the greater part. When, therefore, they granted to this corporation the privilege of receiving money on deposit, and giving certificates payable to bearer, they must have intended to grant all the necessary consequences attending such an act—the power to give such certificates, with all the incidents thereto; that is, the power of circulation so far as certificates of deposit usually circulate. The transaction of the business of deposits embraces its entire range, from the reception to the paying out of the deposit. The manner and form are to be such as, in the company's discretion, might seem convenient and necessary in paying out, as well as in receiving the deposits; and the paying out and receiving are inseparably connected, so far as the discretion of the company extends. It cannot be denied, that the company may well deem it convenient and necessary, in the multitude of its transactions, not to be compelled in paying out to

inquire into the identity of the holder, or the genuineness of the endorsement; and thus the form of the certificate may, under the charter, be such as to enable the paper to circulate from hand to hand. The form of the certificate thus becomes a vital right, a substantial power, which, to be effective, must have the force it purports to have. The company had the power, therefore, to put such certificates in circulation, to answer such purposes as might result therefrom.

9. The power of giving certificates, having the attribute of circulation, having been granted, it makes no difference that they are given for small sums. This does not affect the power, but only involves the degree and extent of circulation; and there is no restriction, in this respect, either in the charter, or in the general law.

10. Neither does the manner of engraving make any difference, or whether the certificate is printed or written; provided it shows on its face the true character of a certificate of deposit.

11. If the positions above stated are well taken, the charter of this corporation repeals the sections of the Code with which it conflicts.

12. There is a clear distinction between sections 935, 1484 and 3269, and sections 3268 and 3270 of the Code. The former prohibit the issue of paper to pass as money; the latter, paper to answer the purposes of money. The distinction is a plain one: bills of exchange answer the purposes of money, and so do bank-checks; while bank-notes are used as money itself. The power to give these certificates, then, does not conflict with sections 935, 1484, and 3269 of the Code, but is repugnant to sections 3268 and 3270; and the latter must be held repealed. These sections, moreover, are in derogation of a common-law right, and must be strictly construed.

13. As to the constitutionality of the charter: A bank, under the State constitution, is one which has all the powers of banking—discount, deposit, and circulation. The power of circulation is that of issuing its own bills, and is distinct from that of receiving on deposit, and giving certificates therefor; and yet these certificates have, to some

extent, equally with bank-notes, the attribute of circulation.—Bank of Augusta v. Earle, 13 Peters, 593; Nance v. Hemphill, 1 Ala. 551; Harrison v. Mahorner, 14 Ala. 829; Kane v. Paul, 14 Peters, 33. As to the free banks of New York, which are declared not to be within the provisions of the State constitution, see 22 Wendell, 74; 23 Wendell, 103; 3 Selden, 328; 3 Comstock, 479; 1 Hill, 616; 4 Hill, 20; 7 Hill, 504; 1 Sandf. Ch. 209.

In Safford v. Wyckoff, 1 Hill, 11, the paper showed on its face that it was negotiable; and the prohibition was against all such paper, not issued as required by the statutes of the State. In such case, the court could pronounce on it as matter of law.

Turner Reavis, *contra*.—1. The certificates show upon their face that they are intended to pass from hand to hand as money, or in lieu of money. They are in denominations of *one*, *two*, and *three* dollars; showing that they are intended to be used as change. They are payable to bearer. They are lettered and numbered like bank-notes. They are to be signed by the president and secretary, in the same way a bank-note is signed by the president and cashier of a bank. They are engraved like bank-notes, and on bank-note paper. They have the name of the company engraved upon them, and the names of the engravers; showing that they were expressly prepared for the company. The *tout ensemble* induces the eye to regard them as bank-notes; and they are in all respects in the similitude of bank-notes. These *indicia* of an intent that they are to be used as money, render the conclusion that such is the intent irresistible.—Whetstone v. Br. Bank, 9 Ala. 883; Hazleton Coal Co. v. Megargel, 4 Barr, 328.

It is contended for the appellants, however, that the court cannot determine as a *fact*, that the certificates show upon their face that they are intended to pass from hand to hand as money. This position cannot be maintained. In a chancery case, the court occupies the positions of both judge and jury in a court of law; and may, therefore, determine questions of both law and fact, when they necessarily arise. This case is similar to the

case of a bill which alleges that a deed, made an exhibit to the bill, was made with intent to hinder, delay, and defraud creditors. Now the question in that case, to-wit, the *intent*, is just as much a *fact*, as the question of *intent* in this case; and it is well settled that, in that case, the court may decide, upon an inspection of the deed, whether it is fraudulent or not. As to the practice of the court in deciding questions of fact upon demurrer, see 2 Sim. & Stu. 93, margin. But there is a more fatal objection to the position: *The demurrer admits the allegation, that the engraved forms referred to in the resolution are identical with those made exhibits to the bill, and show upon their face that they are intended to pass from hand to hand as money.* Story's Eq. Plead. 630. The question of *intent* is, therefore, settled by the pleadings. Moreover, the bill alleges that the company have no power to issue certificates in the form of the exhibits. This is a question of *law*, which the court *can* determine, upon inspection of the certificates and the charter.

2. It is conceded, that the company have power to issue certificates, as acknowledgments of *bona-fide* deposits, in such sums as are actually deposited, and in such manner and form as they shall deem convenient and necessary for the transaction of the business of receiving deposits. But, while they have the power to do *that*, they have not the power to do it with the *intent* that they shall pass from hand to hand as money, or in lieu of money. The *intent* makes their issue unlawful.—Branch Bank v. Crocheron, 5 Ala. Rep. 250; Curtis v. Leavitt, 17 Barb. 322, 323; Commonwealth v. Horner, 10 Leigh, 700; Hazleton Coal Co. v. Megargel, 4 Barr, 328. To render the issue of such certificates, with such intent, lawful, the company must have *express* power, not only to issue them, but to issue them to answer the purposes of money, or with the intent that they shall answer that purpose. The power to issue them for such purposes, or with such intent, cannot be *implied* from the mere power to issue them in any form, as acknowledgments of *bona-fide* deposits. Such an *implied* power is expressly forbidden by sections 1483 and 1484 of the Code. These provisions of the Code prevent

the charter of the company from operating as an implied repeal of the general statutes restraining the exercise of banking privileges. There is no conflict, however, between the power manifestly intended to be given the company, and the general statutes restraining banking. They can all stand together without any conflict; and one statute is never held to repeal another when both can stand. Kinney v. Mallory, 3 Ala. Rep. 626; Wyman v. Campbell, 6 Porter, 219; State v. Stebbins, 1 Stew. Rep. 299. This company was incorporated after the Code went into operation; and as there is no *express* power given to them to issue certificates, or acknowledgments of deposits, *to answer the purposes of money*, the charter is to be construed in reference to the provisions of the Code restraining the issuance of *any* paper, to answer the purposes of money. These provisions will be found in sections 1483, 1484, 935, 936, 2651, 3268, and 3269. Being thus construed, the effect of the charter is just the same as if a proviso were inserted in it to the effect, that the certificates, or acknowledgments of deposits, should not be issued with the intent that they should pass from hand to hand as money.—The People v. The Utica Ins. Co., 15 Johns. 358.

3. If the charter gives the company power to issue certificates, or acknowledgments of deposits, to answer the purposes of money, then the charter, so far as it confers banking powers, is unconstitutional. For this power, in connection with the powers conferred by the 6th section of the charter, constitutes the corporation a bank, within the spirit, if not within the letter, of the constitution; and the charter does not provide for any reservation of stock to the State, nor for the liability of the stockholders for the debts of the company. The 6th section of the charter authorizes the company *to lend their money at interest, to invest it in real or personal securities, by* DISCOUNTING, *and to deal with the same in the purchase and sale of domestic and foreign exchange.* The 8th section authorizes them "to receive in trust, or on deposit, all funds or moneys that may be offered to them, whether on interest or otherwise; and to give acknowledgments therefor, in such manner and form as they may deem convenient and

necessary to transact such business." And if, under the 8th section, these "acknowledgments" may be issued to answer the purposes of money, what more is necessary to constitute the company a bank?—Hazleton Coal Co. v. Megargel, 4 Barr, 328; Branch Bank v. Crocheron, 5 Ala. Rep. 250; Curtis v. Leavitt, 17 Barb. 322, 323; Commonwealth v. Horner, 10 Leigh, 700; Whetstone v. Branch Bank, 9 Ala. Rep. 883; The State v. Stebbins, 1 Stew. R. 299; The People v. Utica Ins. Co., 15 Johnson, 358. Banking being a common-law right of every *citizen*, the legislature may permit every *citizen* to exercise it. But a *corporation*, created by statute, has no common-law rights. It has only such rights as are given to it. It cannot exercise *banking* powers, unless they are *expressly* given. And since the adoption of the constitution of Alabama, the legislature cannot confer such banking powers, as are claimed by the appellants for the Gainesville Insurance Company, without the reservations and provisions prescribed by the constitution.—The State v. Stebbins, 1 Stew. Rep. 299; The People v. Utica Ins. Co., 15 Johns. 358. Besides, the Commercial Bank was chartered at the same session of the legislature with this company; and but one bank can, constitutionally, be chartered at one session of the legislature.

WALKER, J.—Sections 3268, 3269, and 935 of the Code are in the following words: "Any person, private corporation, or association, who, without authority of law, makes or emits any paper to answer the purposes of money, or for general circulation; such person, and each individual of such corporation or association, on conviction, must be fined not less than twenty or more than one hundred dollars, and may be imprisoned not more than twelve months." "Any person in this State, who signs any paper to be put in circulation as money, except under the authority of this State, or countersigns the same, must, on conviction, be fined in a sum not less than one hundred, or more than five hundred dollars; and the signature of such person to any such paper must be taken as genuine, unless the fact of signing be denied on oath by

the defendant." "Every bill of exchange, note, bond, or instrument of any description, whatever may be its form or device, issued with the intent to circulate the same as money, without authority of law, is an absolute, unconditional promise of the association or person putting such bill, note, or other instrument in circulation, and may be sued on by the holder thereof, without transfer or assignment, and without demand, protest, or notice, and the amount thereof recovered, with interest thereon, at the rate of fifty per cent. per annum from the date thereof, or from the time the same was put in circulation."

From these statutes it is manifest, that the issue of paper by the Gainesville Insurance Company, with the intent that it should circulate as money, without the authority to do so, would subject it and its active officers to losses and severe penalties, as well as involve a violation of its charter. If the corporation was about to do that thing which would be attended by such consequences, the court of chancery had jurisdiction to interpose its preventive power at the instance of a stockholder.—Dodge v. Woolsey, 18 Howard, 331–341; Christopher & Tilton v. Mayor of N. Y., 13 Barb. 567.

This case, then, turns upon the question, whether the bill shows that the corporation is about to issue, without authority, certificates of deposit, with the intent that they should circulate as money. In the solution of this question two points of controversy are presented: first, as to the power of the corporation to make such issues with such intent; and, secondly, as to the sufficiency of the bill to show the intent.

1. In determining the extent of the corporate authority, it is proper to look to a law, found in the Code, which was in force before the adoption of the act of incorporation. The law alluded to is as follows: "No private corporation, to which such powers are not expressly given, shall, by any implication or construction, be deemed to possess the power of discounting bills, notes, or other evidences of debt, of receiving deposits, of buying and selling gold, silver, bullion, or foreign coin, or *of issuing bills, notes, or other evidences of debt, upon loan, or for circula-*

tion as money."—Code, § 1484. This statute must operate in the construction of the charters of all private corporations, adopted after its enactment.—Br. Bk. at Decatur v. Jones, 5 Ala. 487; Ang. & Am. on Cor. (3 ed.) 239, 240; People v. Utica Ins. Co., 15 Johns. 358.

But it is said that the legislature could repeal that statute, and have done so, in effect, so far as this corporation is concerned, in the charter. No provision of the charter expressly repeals that statute. If the charter, when considered alone, and without reference to any other law, would merely authorize the "*implication or construction*" that the corporation had the power to issue paper for circulation as money, it would not effect an exemption from the prohibitory section of the Code above copied, or operate a repeal of it as to the particular corporation. Corporations which would otherwise have the power, by implication or construction, are those which the prohibitory section of the Code is designed to restrict. If it does not restrict such corporations, it has no effect, and is virtually repealed by the contingency in which it was designed to exert its force. It is, then, only necessary to inquire, whether the charter expressly grants the power in question; for, if it does not, there is no repeal or modification of the prohibitory section of the Code, so as to secure an exemption from the restriction of that section.

The only section of the charter, supposed to bear on this question, is in the following words: "The said company shall be authorized to receive, in trust, or on deposit, all funds or moneys that may be offered to them, whether on interest or otherwise; and that *they have power to give acknowledgments for deposits, in such manner and form as they may deem convenient and necessary to transact such business;* all such moneys, so deposited, being free from loss or indebtedness, growing out of the insurance business of said company." The power to issue paper for circulation as money is not, in this extract from the charter, given by name; and we think it demonstrable, that it is not included in any of express powers named.

The authority to give acknowledgments of deposits, in such "manner and form" as the corporation might *deem*

convenient, undoubtedly clothes it with a discretion as to the manner and form of the acknowledgments. But that discretion is not unlimited. It is limited by the scope of the power conferred.—City Council of Montgomery v. Montgomery and Wetumpka Plank-Road Company, at last term; Beaty v. Knowler, 4 Peters, 152–171; People v. Utica Ins. Co., 15 Johns. 358. The power is, to receive deposits, and give acknowledgments, in manner and form convenient and necessary to transact the business of receiving deposits. The discretion of the corporation is in the selection of the manner of the instruments by which it will execute the power of receiving deposits; and it must be exercised within the area of that power. It cannot be exercised for the purpose of giving their certificates of deposit a circulation as money; because their power is to act as a depositary, and to give acknowledgments as evidences of deposit, and they have no power to emit paper to answer the purposes of money. The charter itself limits the discretion to a manner and form convenient and necessary in the transaction of the business of a depositary. The power of issuing certificates of deposit is distinct and distinguishable from that of issuing paper for circulation as money. Certificates of deposit may be somewhat assimilated to paper money, in their susceptibility of transfer; but they are different, and the discrimination between them is as easy as between ordinary promissory notes and bank-bills. The power to issue paper, which may be transferred, is not a power to issue paper to circulate as money. If the corporation should issue its certificates of deposit in a manner and form to procure for them a circulation as money, it would issue them in a manner and form not merely convenient and necessary to transact the business of a depositary, but to transact that business, and also the additional and distinct business of emitting paper to answer the purposes of money. The corporation may issue its certificates of deposit in any manner and form which will accomplish its business of a depositary; but not in such manner and form as will accomplish that and another business. If it can so fashion its certificates of deposit as to procure for them

a circulation as money, it can add to its granted powers by an ingenious device, and obtain by subterfuge an authority which legislative caution withheld from it. The corporation has not the authority to issue paper to answer the purposes of money, or to give its certificates a form and semblance which will accomplish that object.

2. The question still to be considered is, whether the bill of complainant shows that the corporation was about to issue paper to answer the purposes of money. The allegation is, that certain engraved forms of certificates of deposits, specimens of which are attached as exhibits to the bill, and made parts of it, were adopted by the board of directors, and show upon their face that they were intended to pass from hand to hand as money, or in lieu of money. The pleader does not say, that the certificates were intended, when issued, to circulate as money; but that the engraved forms manifest upon their face the intent. Is that so? Is the intent a legal conclusion from those engraved forms, and from the fact that they are about to be filled up and emitted?

The engraved forms are in the similitude of bank-notes, and have the vignette and other embellishments characteristic of bank-notes. Their amounts are designated, as the denominations of bank-notes, by marginal letters and figures. They are numbered and lettered as bank-notes; are to be signed by the president, and countersigned by the secretary; are for amounts of one, two and three dollars, payable to bearer on the return of the certificate, which is in effect the same as if they were payable, like bank-notes, on demand; and, in addition to all this, they are printed on bank-note paper. They differ from bank-bills only in the fact, that they purport to be certificates of deposit, and are redeemable in bills of specie-paying banks. From these evidences, patent upon the faces of the engraved forms, a chancellor, in passing like a juror upon the facts, would infer the fact that they were intended to answer the purposes of money. Every characteristic, which could contribute to procure for them a circulation as money, without the abandonment of the name of certificates of deposit, has been given to them;

and then their small amounts clearly indicate the intention that they should issue for sums not adapted to represent singly an entire amount deposited, but suitable for circulation as money. The authorities fully maintain the proposition, that the intent as a fact might be inferred from such testimony.—Safford v. Wyckoff, 1 Hill, (N. Y.) 15; S. C., 4 Hill, 442; Smith v. Strong, 2 Hill, 241; Hazleton Coal Co. v. Megargel, 3 Barr, 324; Att. Gen. v. L. & F. Ins. Co., 9 Paige, 470.

But the inference of the intent would be but the inference of one fact from another. It is not sufficient, in chancery pleading, simply to aver the evidence from which a required fact might be inferred, although the evidence itself, if uncontradicted, and not overcome by opposing proof, might be sufficient to induce a chancellor or a jury to find the fact from it.—Knight v. Vardeman, 25 Ala. 262; Costillo & Keho v. Thompson, 9 Ala. 937; Ogletree v. The State, 28 Ala. 701; Oliver v. State, 17 Ala. 597. The averment of the evidence afforded by the engraved forms, although, unopposed, it might justify the conclusion of the necessary fact that the intent existed, cannot be substituted for the averment of that fact. That evidence is not the requisite fact. It but produces that combination of probabilities from which disputed facts are inferred, and may be overcome by countervailing evidence.—Carter v. Anderson, 4 Geo. 517.

The averment, that the engraved forms show the intent, is a statement that such is the conclusion of law. The correctness of such a statement the demurrer does not have the effect of admitting.—Story's Eq. Pl. § 452; Carter v. Anderson, 4 Geo. 517. It is not a conclusion of law, from the face of the certificates, that the purpose of their issue would be that they might circulate as money. The averment of the bill is, therefore, insufficient to show the intent; consequently, the bill does not contain equity, and the demurrer should have been sustained.

The decree of the court below is reversed, and the cause remanded.

PLANTERS' BANK OF TENNESSEE *vs.* DAVIS.

[REAL ACTION UNDER CODE.]

1. *Construction of deed.*—A deed of gift, by which a mother conveys lands to her married daughter, "for her sole and separate use, behoof and benefit, exclusive and independent of the property and contracts of her husband, and unto her heirs and assigns forever;" and containing a reservation, or stipulation on the part of the daughter and her husband, both of whom executed the deed with the grantor, to the effect that the grantor, "for and during the term of her natural life, may have, use, occupy and enjoy the before conveyed premises, free and exempt from payment of rent, impeachment for waste, and all and every other charge for the possession, improvement, or use of the said premises,"—reserves a life estate to the grantor, with a vested remainder in fee in the daughter.
2. *When husband is entitled to curtesy in wife's lands.*—Where lands are conveyed during coverture to the separate use of the wife in fee, and the deed reserves a life estate to the grantor, the husband does not, on the death of the wife living the grantor, become tenant by the curtesy.

APPEAL from the Circuit Court of Madison.
Tried before the Hon. WILLIAM M. BROOKS.

THIS action was brought by the appellant, against Nicholas Davis, Jr., to recover certain premises in Huntsville, known as "The Grove," of which the defendant was in possession, and which the plaintiff claimed by purchase at sheriff's sale under execution against Bartley M. Lowe. The premises in controversy belonged to Dr. James Manning, who died in 1841, devising them to his widow, Mrs. Sophia Manning. Mrs. Manning went into possession under the devise, and, on the 5th November, 1841, conveyed the premises by deed of gift to her daughter, Mrs. Sarah P. S. Lowe, then the wife of Bartley M. Lowe, "to have and to hold unto the said Sarah P. S. Lowe, for her sole and separate use, behoof and benefit, exclusive and independent of the property and contracts of her husband, the said Bartley M. Lowe, and unto her heirs and assigns forever." The deed also contained a stipulation on the part of Lowe and his wife, in these words: "And the said Sarah P. S. Lowe, jointly with

her husband, the said Bartley, and with his consent, done and signified by his signing with her these presents, doth agree and consent, that the said Sophia Manning may have, use, occupy and enjoy the before conveyed premises, for and during the term of her natural life, free and exempt from payment of rent, impeachment for waste, and all and every other charge for the possession, improvement, or use of the said premises." This deed was executed by Mrs. Manning, and by Lowe and wife; and was acknowledged by the parties on the 17th November, 1841.

Mrs. Lowe died in 1845, and Mrs. Manning in 1853. Lowe and wife had children born alive of their marriage, both before and after the execution of Mrs. Manning's deed; one of whom is now the wife of the defendant. Lowe is still in life. The plaintiff, having obtained a judgment against said Lowe, in February, 1847, had an execution issued thereon in September, 1855, and levied on the premises in controversy; and at the sheriff's sale in January, 1856, became the purchaser, and obtained the sheriff's deed.

On these facts, the court charged the jury, that the plaintiff was not entitled to recover; to which charge the plaintiff excepted, and which is now assigned as error.

Walker, Cabaniss & Brickell, for appellant.—It is contended that Lowe, on the death of his wife, became tenant by the curtesy, and thus had a life estate subject to sale under plaintiff's execution. Three of the constituents of tenancy by curtesy—viz., marriage, the birth of issue alive capable of inheriting, and the death of the wife—are undisputed. Was the fourth constituent wanting? In other words, is actual seizin of the wife during coverture necessary to constitute the husband tenant by the curtesy?

It was unquestionably the law of England, at an early day, that to entitle the husband to an estate in his wife's realty, as tenant by the curtesy, he must have been actually seized of the land, in right of his wife, at some time during the coverture.—Co. Litt. 29. This principle was the result of the ancient law of disseizin, which made the

disseizin of the tenant of the freehold operate to divest his estate, and reduce it to a mere right. At common law, the possession of the lessee for years was always held a sufficient seizin to constitute the husband tenant by curtesy; the reason being, that the possession of the lessee was the possession of the wife.—Clancy on Husband and Wife, 182. The reason of the common law, making seizin indispensable to curtesy, was, that livery of seizin was necessary to the transfer of a freehold estate by deed, and an entry by the heir or devisee was necessary to perfect his title to such an estate; consequently, unless the wife, or the husband in her right, was actually seized, her issue could never, *as her heirs*, inherit the land.—3 Bac. Abr. (Bouvier's ed.) 11; 2 Bla. Com. 128. Or the principle may be thus stated: An estate of inheritance alone entitling the husband to curtesy, actual seizin was necessary, because the heir, claiming by descent, must derive his title from the person last seized; consequently, if the wife was not seized, the heir could not inherit from her; and thus one of the requisites of the husband's title—viz., issue that could inherit the estate from the wife—was wanting.—1 Roper on Husband and Wife, mar. 7. The foundation of the rule is thus stated, and the doctrine fully discussed, in Davis v. Mason, 1 Peters, 506; 5 Cowen, 74; 3 Hill, (N. Y.) 184; 2 Cushman, 276; 4 Day's (Conn.) R. 298.

The English courts, in modern times, have modified the rule of the common law, and hold a constructive seizin during coverture sufficient to perfect the husband's title as tenant by the curtesy.—DeGrey v. Richardson, 3 Atk. 469; Sterling v. Penlinton, 3 Eq. Cas. Abr. 730. Even at common law, a seizin in law was sufficient to give curtesy in all inheritances created without entry.—3 Bac. Abr. 12; 5 Cowen, 74, 98. And the English courts have held the husband to be tenant by the curtesy of an equity of redemption, because the fee could not be in abeyance, and must be in the mortgagor until foreclosure.—5 Madd. 248; Clancy's H. & W. 188.

In this State, a freehold in lands, to take effect *in futuro*, may be created without livery of seizin, where the deed

reserves to the grantor a life estate in the premises; and such reservation will be construed into a covenant to stand seized to the use of the grantee.—Simmons v. Augustin, 3 Porter, 69, 91. Under our statute of uses of 1812, (Clay's Digest, 156, § 35,) which was in force when the deed in this case was made, the possession of Mrs. Manning was the possession of Mrs. Lowe; the deed created a freehold, to take effect *in futuro;* the reservation of the life tenancy to Mrs. Manning operating as a covenant to stand seized to the use of Mrs. Lowe. There never was, in this country, any reason for the principle of livery of seizin. Our lands were always held in *allodium*, and never in fee, as the term was originally used. Nor was an entry ever necessary, with us, to perfect the title of an heir or devisee. The most common instrument of conveyance is a deed of bargain and sale, which, without the aid of a statute of uses, transfers both the legal and the equitable estate. Indeed, a mere quit-claim deed, or release, is sufficient, even where the releasee has no prior interest in the land. It is, therefore, an application merely of a common-law principle to say, that a seizin in law is sufficient, in this State, to confer curtesy.

What is seizin in fact, or in deed? It is the actual possession of the land, by one's self or tenant, accompanied with the estate in reversion, for life or in fee. 1 Tucker's Com. 57. By this deed, the inheritance is in Mrs. Lowe. If there was a life estate in Mrs. Manning, created by the covenants of Lowe and wife in the deed, the proof shows that she was in possession, and had such seizin as (according to this definition) would support the remainder. But, if Mrs. Manning's life estate is not created by the covenants of Lowe and wife, but is reserved to her, livery of seizin to her was not necessary, as she was already in; and when the tenant for life is in by livery of seizin, which is seizin in fact, her possession is that of the remainder-man.—6 Ala. 350; 1 Tucker's Com. 126. The estate of inheritance is in Mrs. Lowe, and the use only in Mrs. Manning. The stipulations in favor of the latter simply confer on her the privilege of occupation and pos-

session, and do not amount to a regrant of any property affecting the inheritance.—78 E. C. L. 304.

Robinson & Jones, *contra*.—1. The deed of Mrs. Manning conveyed the premises in controversy to the sole and separate use of Mrs. Lowe, and entirely excluded the marital rights of the husband.—Roper v. Roper, 29 Ala. 250; Jenkins v. McConico, 26 Ala. 237; Ozley v. Ikelheimer, 26 Ala. 336; Strong v. Gregory, 19 Ala. 148; Newman v. James, 12 Ala. 19; Brown v. Johnson, 17 Ala. 232; Williams v. Maull, 20 Ala. 721; Gould v. Hill, 18 Ala. 84; Hoot v. Sorrell, 11 Ala. 387; Anderson v. Brooks, 11 Ala. 954. Curtesy is one of the husband's marital rights, and does not attach where his rights are expressly excluded. The rule is not laid down with entire uniformity by different writers; but all concur in the proposition, that it is a question of intention, and that the right of curtesy does not attach where there is an express intention to exclude the marital rights of the husband.—4 Kent's Com. 31; Hilliard on Real Property, vol. 1, p. 329; Crabbe, vol. 2, p. 76, § 1006; Clancy, 191; Bright on H. & W. 137, § 31; Morgan v. Morgan, 5 Madd. 408; Bennett v. Davis, 2 P. W. 316; Roberts v. Dixwell, 1 Atk. 607; Cunningham v. Moody, 1 Vesey, sr. 174; 2 Vernon, 536; 3 Bro. C. C. 404; 14 Sim. 125; 3 Atk. 697; 4 Watts & Serg. 95; 19 Conn. 272; 1 Harris, 267; 2 Harris, 361. The right of curtesy is inconsistent with the interest which a *feme covert* has in her separate estate. She may charge it with debts, sell it, or dispose of it in any other manner, as if she were a *feme sole*. This absolute right of disposition in the wife is incompatible with any right of property in the husband. After birth of issue, the husband becomes tenant by the curtesy initiate, and is entitled to a freehold for life in his own right, which he may sell, or which may be sold under execution against him. 1 Bright on H. & W. 112; Clancy, 185; 1 Co. 558; 24 Miss. (2 Cushm.) 261; 11 Ala. 616; 25 Ala. 152. How can this right in the husband and his creditors co-exist with a separate estate in the wife?

2. The deed reserved a life estate to Mrs. Manning, who survived Mrs. Lowe; consequently, there was no sufficient seizin in Mrs. Lowe, during coverture, to entitle her husband to curtesy. At common law, seizin in fact was necessary to entitle the husband to curtesy—seizin in law was not sufficient; and the reason assigned was, that it was the husband's duty to strengthen the wife's title by possession, and that his failure to do so deprived him of all claim upon the bounty of the law.—4 Kent's Com. 29; 1 Co. 558; 2 Bla. 127; Neely v. Butler, 10 B. Monroe, 48; Varnarsdale v. Fauntleroy's Heirs, 7 B. Monroe, 401. The possession of a tenant for years was deemed the possession of the landlord or reversioner, constituting a seizin in fact in the latter, which entitled the husband to his curtesy.—Carter v. Williams, 8 Ired. Eq. 177; 4 Ohio, 271. The rule has been relaxed, in some cases, so far as to allow curtesy in wild and uncultivated lands, or unoccupied lands, where there is a seizin in law.—Jackson v. Sellick, 8 John. 268; Davis v. Mason, 1 Peters, C. C. 503; Jackson v. Johnson, 5 Cowen, 74; Wells v. Thompson, 13 Ala. 803; Borland's Lessee v. Marshall, 2 Ohio St. R. 308. In some of these cases the decision is placed on the ground of a constructive possession in fact; in others, that a seizin in law is sufficient; and in others, that the reason of the common-law rule does not apply in this country. But amidst this conflict of decisions, and contrariety of opinion, no case has yet held a present seizin unnecessary: all concur in requiring a present seizin—a seizin during coverture—whether it be actual, constructive, or legal. No case can be found, in which curtesy was allowed to the husband upon a right to the mere fee or inheritance, without a right to the present possession. "A man shall not be tenant by the curtesy of a bare right, title, use, or of a reversion, or of a remainder expectant upon an estate of freehold, unless the particular estate be determined or ended during the coverture."—1 Co. 559; Clancy on H. & W. 186; 2 Bla. Com. 127; 4 Kent, 29; Stoddard v. Gibbs, 1 Sumner, 270; Tayloe v. Gould, 10 Barbour, 400; Jackson v. Johnson, 5 Cowen, 74; Carter v. Williams, 8 Ired. Eq. 177; 12 B. Monroe, 433. There is no

material distinction between the seizin which entitles the husband to curtesy and that which entitles the wife to dower; and the wife has never been held entitled to dower in a vested remainder or reversion upon a freehold estate, where the life estate did not terminate during the life of the husband.—7 Mass. 253; 5 N. H. 240, 469; 4 Ired. Eq. 265; 23 Pick. 80; 1 Barb. S. C. 504; 1 Barb. Ch. 598; 1 Paige, 634; 2 Serg. & R. 554; 1 Leigh, 30. Mrs. Manning's deed reserves to herself a life estate, with a vested remainder in fee in Mrs. Lowe.—Golding v. Golding, 24 Ala. 122; 5 Yerger, 149; 20 Johns. 85; 3 Wendell, 233; 13 Ala. 186; 14 Ala. 437; 5 Pick. 181; 10 Pick. 228.

STONE, J.—The deed from Mrs. Manning to Mrs. Lowe reserved a life estate in the former, with a vested remainder in fee in the latter.—Golding v. Golding, 24 Ala. 122; Mackey v. Proctor, 12 B. Monroe, 433; Doe v. Croft, 78 Eng. Com. Law, 323; Jackson v. McKinney, 3 Wend. 233; Scott v. Baber, 13 Ala. 186; Jackson v. Swart, 20 Johns. 85; Jackson v. Dumbagh, 1 Johns. Cas. 91; Jackson v. Staats, 11 Johns. 351.

If it be conceded that this deed must be construed as a covenant by Mrs. Manning to stand seized to the use of Mrs. Lowe, this does not in the least impair the life estate of the grantor. This implied covenant to stand seized is but a legal fiction, called into being as a precedent estate to support the remainder, and does not import a present actual or constructive seizin (possession) in the remainder-man. Such remainder-man is not the "person for whose use, or in trust for whose benefit, another is seized of lands," within section 9 of the act of 1812.—Clay's Dig. 157, § 36. The use and trust contemplated by this section, are a present vested use and benefit; a present right to the usufruct.

The question we are considering comes under section 8 of the act of 1812.—Clay's Dig. 156, § 35. That section, omitting the parts which are not pertinent to this case, reads as follows: "In all cases, * * by deed operating by way of covenant to stand seized to use, the possession

of the bargainor, releasor, or covenantor, shall be deemed * * to be transferred to the bargainee, releasee, or person entitled to the use of the estate, *or interest which such person hath or shall have in the use*, as perfectly as if such bargainee, releasee, or person entitled to the use, had been enfeoffed, with livery of seizin, of land intended to be conveyed by the said deed or covenant." This section transfers the possession or seizin, only to the extent that the grantee *hath or shall have an interest in the use;* and as the interest of Mrs. Lowe was only in remainder, this statutory or constructive seizin could operate to no greater extent.

As Mrs. Lowe died long before the act of 1812 was superseded by the Code, it is perhaps unnecessary that we should consider to what extent this question is affected by the latter compilation of laws. If material, however, it is clear that Mrs. Manning's life estate would be protected under section 1329 of the Code, which reads as follows: "The grantor in any conveyance may reserve to himself any power beneficial, *or interest*, which he may lawfully grant to another."—See, also, 4 Kent Com. (8th ed.) 551; Bedell's case, 7 Coke 633.

It being thus shown that Mrs. Manning had a life estate in these lands which did not determine during the lifetime of Mrs. Lowe, the rule applies in all its force, which declares, "if there be an outstanding estate for life, the husband cannot be tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during the coverture."—4 Kent's Com. (8th ed.) 28; Stoddard v. Gibbs, 1 Sumner, 263; 1 Roper's H. & W. 9, *et seq.;* 1 Bright on H. & W. 119; Mackey v. Proctor, 12 B. Monroe, 433; Tayloe v. Gould, 10 Barb. Sup. Ct. 400; 2 Tuck's Com. 57; Eldridge v. Forrestall, 7 Mass. 253; Blood v. Blood, 23 Pick. 80; Shoemaker v. Walker, 2 Serg. & Rawle, 554; Weir v. Humphries, 4 Ire. Eq. 279; Fisk v. Eastman, 5 N. H. 240; Dunham v. Osborn, 1 Paige, 364.

Having thus shown that one of the essential elements in every title by curtesy—viz., seizin, either actual or

constructive, at some time during the coverture—is wanting in this case, we need not consider any other question presented by the record.

The judgment of the circuit court is affirmed.

REYNOLDS *vs.* CROOK.

[BILL IN EQUITY BY BENEFICIARIES OF TRUST DEED TO ENJOIN SALE OF PROPERTY UNDER EXECUTION AGAINST GRANTOR.]

1. *Validity of deed of trust for indemnity of sureties.*—A deed of trust on slaves, executed by the guardian of several minors under fourteen years of age, who was in embarrassed circumstances, for the indemnity of the sureties on his bond; providing that the property shall remain in the possession of the grantor until the happening of the contingencies on which a sale is authorized; and authorizing the trustee to proceed to sell the property, on the written request of the four sureties, their agents or attorneys, after the grantor had committed a breach of his bond, and had failed to save his sureties harmless,—is void on its face, (Code, § 1550,) as against the grantor's creditors.

APPEAL from the Chancery Court of Benton.
Heard before the Hon. WADE KEYES.

THIS bill was filed by James M. Crook, James F. Grant, James A. McCampbell, and George C. Whatley, against Walker Reynolds, Samuel P. Hudson and others; and sought to restrain the sale of certain slaves, on which an execution in favor of Reynolds against Hudson had been levied by the sheriff, and which Hudson had previously conveyed by deed of trust to one L. W. Cannon, to indemnify the complainants against liability as his sureties on a guardian's bond; also, to have the deed of trust "established and made effectual," the negroes sold under an order of court to prevent waste and loss, and for other and further relief as the circumstances of the case might require.

The judgment in favor of Reynolds, against Hudson, which was rendered on the 10th May, 1855, was for $4,596 95, besides costs. The deed of trust which the complainants sought to have established, was executed on the 18th April, 1855, was acknowledged and recorded on the third day after its execution, and conveyed twelve slaves to the trustee, "for the uses and purposes, and under the express stipulations following—that is to say: The property herein mentioned and conveyed is to remain in the possession of the said S. P. Hudson, and for the use thereof the said Hudson is to keep and provide for the same as if it were really his own, until hereinafter provided; that if the requirements of said bond shall not be fully complied with, and the said Hudson fail to save his said sureties harmless whenever they, their agents or attorneys, shall request the said L. W. Cannon, in writing, to proceed in the execution of the trust herein reposed in him, he, the said L. W. Cannon, shall, immediately upon such request being made, take possession of said property, and shall sell the same, under the following restrictions—viz., after advertising the said property for thirty days in the *Jacksonville Republican*, and sell the same, at public outcry, before the courthouse-door in the town of Jacksonville, to the highest bidder, for cash; which property the said Hudson agrees to deliver up when called for; and the proceeds of said sale, made as aforesaid, the said Cannon is authorized to pay, first, to the expenses attending the taking and authenticating of this deed, and then pay to the said sureties a sufficient amount to fully indemnify them for all they may have paid for said Hudson on said bond, together with all costs and interest thereon, and the remainder, if any, shall remit to the said Hudson; and the said Cannon, trustee as aforesaid, is hereby authorized to convey to the said purchaser or purchasers, or to his or their agents or attorneys, what right may remain in said Hudson to said property. But, if the said Hudson shall in good faith comply with the requirements of said bond, and fully discharge the obligations therein contained, and save his said sureties harmless, as the same may be required of him; then this obligation

to be null and void, and the right of said property herein mentioned to remain in the said S. P. Hudson."

The chancellor overruled a demurrer to the bill for want of equity, and rendered a final decree in favor of the complainants, which is now assigned as error.

JAMES B. MARTIN, for the appellants.

ALEX. WHITE, and GEO. C. WHATLEY, *contra.*

RICE, C. J.—From the bill and exhibits it appears, that in February, 1854, Samuel P. Hudson was appointed guardian of five children of a decedent, all of whom were under fourteen years of age; that he entered into bond, with the complainants—four in number—as his sureties, in the penal sum of twelve thousand dollars, conditioned for the performance of his duties as such guardian; that on the 18th day of April, 1855, he "became embarrassed in his circumstances, and, being desirous of indemnifying and saving complainants from any loss as his sureties as aforesaid, executed for that purpose a deed of trust," which was duly recorded on the 21st of April, 1855, and a copy of which is set forth in exhibit B to the bill; that on the 10th of May, 1855, Walker Reynolds recovered a judgment in the circuit court of Talladega, for $4596 95, besides costs of suit, against Moore, Terry, Wyly, and the said Hudson, all of whom are respondents; that execution issued under said judgment, and in August, 1855, was levied on all the slaves conveyed by said deed; that at the filing of the bill, in September, 1855, Hudson was "largely indebted and embarrassed in his pecuniary circumstances," and had "made several deeds of trust for the security of his creditors, by which he had conveyed all his property, both real and personal, to provide for the payment of his debts; and that the property so conveyed was not more than sufficient to pay the debts thus secured," and complainants "knew of no means or property belonging to said Hudson to which they could look to indemnify themselves against their liability as his sureties on the said guardian bond, except the property onveyed for that purpose" by the deed of trust set forth in exhibit B to

the bill. The complainants found their right to relief upon the deed of trust last above mentioned, and pray for an injunction to restrain further proceedings under said levy; and that the indemnity, which they allege was designed for them by said deed, may be secured to them against said levy, &c.

The deed on which complainants here rely purports to provide indemnity for them, as the sureties upon said guardian's bond, by conveying twelve negroes——four women and eight children—therein described, to L. W. Cannon as trustee, upon certain trusts therein expressed; the first of which is, that the said negroes are to remain in the possession of the grantor, (the said Hudson,) not only until he shall commit a breach of his said guardian's bond, and shall fail to save his said sureties thereon harmless, but *afterwards and until* "his said *sureties*, or their *agents* or *attorneys*, shall request the said L. W. Cannon *in writing* to proceed in the execution of the trust" reposed in him by the deed.

We do not doubt that a valid conveyance of personal property, to provide indemnity for the sureties upon a guardian's bond, may be made.—Code, §§ 1283, 1291; Frow v. Smith, 10 Ala. R. 571; Hopkins v. Scott, 20 *ib.* 179; Hawkins v. May, 12 *ib.* 673. But, under section 1550 of the Code, which declares void, as to the creditors of the grantor, every conveyance of goods, chattels or things in action, made in trust for his use,—it is essential to the validity of a conveyance of chattels, to provide indemnity for sureties on a guardian's bond, as against the crediitors of the grantor, that, at least, its *whole purpose* should be the devotion of the property *bona fide* to the indemnification of the sureties. If *a part of its purpose* is, that it shall avail or be used for the ease or favor of the grantor, it is void as to creditors. A provision in it, by which a sale is unreasonably postponed, and the grantor in the meanwhile to retain the beneficial enjoyment of the property, denotes a part of its purpose to be to secure a benefit to him. And an unexplained stipulation in it, for possession of twelve slaves by the grantor, not only until he should violate his duty as the guardian of five children

under fourteen years of age, commit a breach of his guardian's bond, and fail to save his sureties thereon harmless, but *afterwards and until* his sureties, (four in number,) or their *agents* or *attorneys*, should request the trustee *in writing* to proceed in the execution of the provisions of the deed,—is an express trust for the use of the grantor, within the meaning of section 1550 of the Code, and renders the deed void as against his creditors. Such a trust is expressed in the deed on which the complainants here found their right. If it had not been expressed, the law of this State, as it hath been since the Code went into effect, would not have implied it from the other provisions of the deed. And as it is expressed, the law, as it existed when the deed was made and now exists, will not tolerate it, when assailed by the creditors of the grantor. The nature and provisions of the deed now under consideration are materially different from those of the deed passed upon in Miller v. Stetson, at present term.—See Hodge v. Wyatt, 10 Ala. R. 271; Lockhart v. Wyatt, *ib.* 231; Grimshaw v. Walker, 12 *ib.* 101; Hardy v. Skinner, 9 Iredell, 191; Hafner v. Irwin, *ib.* 490.

It follows from what we have above said, that upon the facts stated in the bill, and the provisions of the deed on which the complainants found their claim to relief, the deed is void as against the creditors of the grantor; and that the chancellor erred in not sustaining the demurrer to the bill for want of equity. The decree of the chancellor is reversed, and a decree must be here entered, sustaining the demurrer, and dismissing the bill for want of equity. The appellees must pay the costs of this court, and of the court below.

HARRIS *vs.* PLANT & CO.

[ACTION ON FERRY BOND.]

1. *Who is proper party plaintiff.*—An action cannot be brought on a ferry bond in the name of the party injured; such bond not being within the provisions of section 2154 of the Code.
2. *Amendment of complaint by change of parties.*—When an action on a penal bond is improperly brought in the name of the person injured, the complaint may be amended, (Code, § 2403,) by inserting the name of the probate judge as nominal plaintiff, suing for the use of the party injured.
3. *Sufficiency of complaint against administratrix.*—Where the complaint, in the marginal statement of the parties, describes the defendant as administratrix; and the cause of action declared on is the breach of a penal bond executed by the intestate in his lifetime,—it sufficiently appears that the defendant is sued in her representative character, and not as an individual.
4. *Misjoinder of defendants not available on error.*—A misjoinder of defendants is not available on error, when the complaint shows a substantial cause of action against both defendants, and the question of misjoinder was not raised in the primary court.
5. *Admissibility of verdict and judgment as evidence for or against third person.*—A verdict and judgment are not admissible evidence for a third person in another suit, within the meaning of section 2302 of the Code, unless they would be admissible against him if they had been in favor of the other party.
6. *Competency of agent as witness for principal.*—In an action against the owner of a ferry, to recover damages for the loss of a wagon and horses destroyed in crossing, the plaintiff's agent, who had charge of the wagon and horses at the time of the loss, is, under section 2302 of the Code, a competent witness for his principal. (Overruling *Steamboat Farmer v. McCraw*, 26 Ala. 189.)
7. *Competency of lessee as witness for lessor.*—The lessee of a ferry, who has charge of it under his lease when a loss occurs, is not, under section 2302 of the Code, a competent witness for his lessor, when the latter is sued for damages.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by George F. Plant & Co., as partners, against Mary M. Harris, as administratrix of Hartwell S. Harris, deceased, and Elijah Rigby; and was founded on a penal bond, executed by said Hartwell Harris on the 1st January, 1850, with said Rigby as his surety, the condition of which was in these words: "Whereas the above bound Hartwell S. Harris is keeper

of the public ferry across the Alabama river below the mouth of Bogue Chitto, being the same ferry established by Rufus W. Greening and John Davis: Now, if the said Harris shall constantly provide and keep the banks on each side of the river in good repair, keep good and sufficient boat or boats, and have the ferry well attended for travelers and other persons wanting to cross, then the above obligation to be void," &c.

In the marginal statement of the parties, in the original complaint, the defendants were thus described: "Mary M. Harris, administratrix of all and singular the goods and chattels, rights and credits, which were of Hartwell S. Harris, deceased, at the time of his death, and Elijah Rigby, defendants;" and the complaint itself was in these words: "The plaintiffs claim of the defendants $1500, for the breach of the condition of a bond, made by Hartwell S. Harris in his lifetime and Elijah Rigby on the 1st January, 1850, payable to William M. Lapsley, judge of the probate court of Dallas county, and his successors in office, with condition," &c., (setting out the condition as above.) "And plaintiffs say, that the condition of said bond has been broken by the defendants, in this: 1st, that the banks of said ferry were not kept in good repair; and in consequence of the negligence of said Hartwell S. Harris and his servants, in not keeping said banks in good repair, the wagon and two horses of plaintiffs, of the value of $600, in crossing said ferry were wholly lost, and this by the negligence of himself and servants, to-wit, on the 27th April, 1855, in the county aforesaid; and, 2d, that the said ferry was not well attended for travelers and other persons wanting to cross, and in consequence of the negligence of said Hartwell S. Harris and his servants, in not having his ferry-boat properly fastened to the bank at said ferry, the wagon and two horses of plaintiffs, of the value of $600, in crossing said ferry were wholly lost, and this by the negligence of himself and his servants, to-wit, on the 27th April, 1855, in the said county of Dallas."

The defendants demurred to the complaint, "on the ground that the suit should have been brought in the

name of the probate judge of the county." The court sustained the demurrer, but granted leave to the plaintiffs to amend; and the plaintiffs thereupon amended their complaint, by adding, "Thomas G. Rainer, judge of the probate court of Dallas county, and successor in office to William M. Lapsley, late judge of the county court of Dallas county, who sues for the use of George F. Plant & Co." To the allowance of this amendment the defendants excepted.

On the trial, the plaintiffs offered one Skinner as a witness, who stated, on his *voir dire*, "that he was hired by plaintiffs, at the time of the injury complained of, by the month, to peddle tin-ware for them, and was driving their wagon and horses which were used in the business, and for the injury to which this suit was brought; but that he had no other connection with them, and was in no wise interested in the event of this suit, and would not be a gainer or loser however it might result." The defendants objected to the competency of this witness, but the court overruled their objection; to which they excepted.

The defendants offered one Vincent as a witness, who stated, on his *voir dire*, "that he was in possession of said ferry, at the time plaintiffs sustained their alleged loss, and was receiving the tolls, (having previously leased said ferry, with other property belonging to the estate of Hartwell S. Harris, deceased, from Mrs. Mary M. Harris, the administratrix;) but that he had never given a bond to indemnify her against any loss accruing during the continuance of his lease." On the plaintiffs' objecting to the competency of this witness, the court refused to let him testify; and the defendants excepted.

The assignments of error embrace all the rulings of the court to which exceptions were reserved; and it is further assigned as error, 1st, "that the court erred in not quashing the complaint, on demurrer, for a misjoinder of defendants;" 2d, "that the court erred in rendering judgment against Mrs. Harris, because there was no cause of action against her;" 3d, "that the court erred in entering a judgment to be levied of the goods and chattels of Hartwell S. Harris, deceased, when his administratrix as such

was not a party to the suit;" 4th, "that the court erred in rendering a judgment against one defendant *de bonis propriis*, and against the other *de bonis intestatis*;" and, 5th, "that the court erred in rendering a judgment against Mrs. Harris as administratrix, when she was not sued as such."

PEGUES & DAWSON, for the appellants.—1. Skinner was not a competent witness for the plaintiffs below, because the verdict in their favor placed him in a state of security against any action which they might otherwise have brought against him.—1 Greenl. Ev. § 396; Otis & Jayne v. Thom, 23 Ala. 472; Steamboat Farmer v. McCraw, 26 Ala. 204; Emerton v. Andrews, 4 Mass. 653; Code, § 2302.

2. Vincent was a competent witness for the defendants below. He was not a party to the suit, and had no opportunity to be heard. A verdict for or against the defendants could not be used as evidence for him in another suit. Steamboat Farmer v. McCraw, 26 Ala. 205; Crutchfield v. Hudson, 23 Ala. 393; Ala. & Tenn. Rivers Railroad Co. v. Burke, 27 Ala. 541.

3. The complaint ought to have been quashed, on demurrer, for a misjoinder of defendants; the complaint showing that Mrs. Harris is sued individually, for the breach of a bond which she never signed.—Crimm v. Crawford, 29 Ala. 628; Agee v. Williams, 27 Ala. 644; 1 Chitty's Pleadings, 204. Misjoinder of defendants may be taken advantage of on general demurrer, or in arrest of judgment, or on error.—Cooper v. Bissell, 16 Johns. 146; 1 Chitty's Pleadings, 205.

4. No judgment could properly be rendered against Mrs. Harris, because no cause of action against her was shown.

5. It was error to render judgment to be levied of the goods and chattels of Hartwell S. Harris, deceased, when his administratrix, as such, was not a party to the suit.

6. It was error to render judgment against one defendant *de bonis propriis*, and against the other *de bonis intestatis*.

Cooper v. Bissell, 16 Johns. 147; 1 Chitty's Pleadings, 199, 204, and note 3.

WM. M. BYRD, *contra*.—1. Skinner was clearly a competent witness for his principals.—1 Greenl. Ev. §§ 316, 317, 394; Rice v. Grove, 22 Pick. 158; Stringfellow v. Marriott, 1 Ala. 573; 2 Ala. 314; 7 Ala. 830.

2. The question of Vincent's competency is not so raised as that it is revisable in this court. Besides, the witness was clearly incompetent, as he was the lessee of the ferry when the loss occurred.—Hamilton v. Cutts, 4 Mass. 349; Tyler v. Ulmer, 12 Mass. 163; Green v. New River Co., 4 Term R. 589; Hawkins v. Finlayson, 3 Car. & P. 305; 1 Greenl. Ev. § 394; Steamboat Farmer v. McCraw, 26 Ala. 189; Otis & Jayne v. Thom, 23 Ala. 469; Gilmore v. Carr, 2 Mass. 171; 3 N. H. 318; 2 Rawle, 57.

3. The questions raised by the other assignments of error, not being made and reserved in the primary court, cannot avail the appellants.

WALKER, J.—A ferry bond is not the bond of an officer, or a bond given in an official capacity; and, therefore, is not embraced by section 2154 of the Code, which authorizes suits upon certain bonds in the name of the person injured.

2. As the suit was commenced in the name of the person injured, an amendment, making it the suit of the probate judge, for the use of such person, was proper; and, being proper, was certainly permissible under section 2403 of the Code.—Governor v. Davis, 9 Ala. 917.

3. The complaint was against Mrs. Harris in her representative capacity, and not as an individual. The cause of action set forth in the complaint is against her in her representative capacity; and therein this case differs from those cited by the counsel for the appellant. The defendant is denominated administratrix, in the commencement of the complaint; and the cause of action is against her as administratrix, upon a liability of the intestate. The complaint contains all the requisites of a declaration at

common law, charging the defendant in a representative capacity.

4. As the law existed before the Code, the representative of a deceased obligor and the surviving obligor could not be joined as defendants in a suit upon a bond.—Gayle v. Agee, 4 Porter, 507; Murphy v. Bank, 5 Ala. 421; Bancroft v. Stanton, 7 Ala. 351. We do not decide, whether the law, in that particular, is changed by section 2143 of the Code. If the law in that respect is unchanged by the Code, the appellants cannot profit by the question; because the complaint contains a substantial cause of action against both defendants, the objection was not made in the court below, where it might have been obviated by an amendment, and cannot be entertained when made for the first time on appeal.—Code, §§ 2403, 2143; Stewart v. Goode & Ulrick, 29 Ala. 476; Blount v. McNeil, 29 Ala. 473.

5. If we abide by the decision of this court, in the case of the Steamboat Farmer v. McCraw, 26 Ala. 189, we are bound to decide, that the court below erred in admitting the witness Skinner to testify for the plaintiff. In that case, a witness, occupying precisely the same relation to the plaintiff with the witness in this case, was held incompetent, even under the rule adopted in section 2302 of the Code. In the absence of any statutory regulation, there are two classes of cases, in which witnesses are incompetent from interest: 1st, cases in which the record may be used in evidence for or against a witness; 2d, cases in which the judgment will have an immediate operation on his interests, otherwise than by becoming evidence for or against him.—Note to Bent v. Baker, 2 Smith's L. Ca. 51. With the reservation that certain other provisions are not affected, section 2302 of the Code sweeps away entirely the latter of the two classes of cases, and makes the competency of witnesses, as to interest, depend upon the question, whether the verdict and judgment would be evidence for the witness in another suit. We decided, in Atwood v. Wright, 29 Ala. 346, that the test whether a verdict and judgment would be evidence for a witness, was the inquiry, would they be evidence against him if adverse to

the party introducing him. That this is the correct test, there can be no doubt. "A person that hath no prejudice by the verdict can never give it in evidence, though his title turn upon the same point."—Starkie on Evidence, part I., p. 196, § 62, and note *n;* 1 Greenleaf on Evidence, § 524.

If a verdict and judgment had been rendered against the plaintiff, in the case of the Steamboat Farmer v. McCraw, the record could not have been evidence in a subsequent suit by the same plaintiff against the owner of the flatboat, who had the plaintiff's cotton in charge; nor could the judgment in this suit, in favor of the defendants, against the plaintiff, have been evidence against the peddler, who had the plaintiff's wagon and horses in charge. If the judgment against the plaintiff were offered in evidence, to show that the loss of the cotton in the former case was not caused by the negligence of the steamboat officers, or that the loss of the wagon and horses in this case was not caused by the negligence of the ferry-keepers, the rejection of the evidence would be inevitable. The witness, being the defendant, could successfully maintain the inadmissibility of the record against him, upon the ground that the judgment was, as to him, *res inter alios acta*—that he was neither a party nor privy, and had had no opportunity to cross-examine witnesses, or to be heard. If the judgment had been against the plaintiff, it could not have been evidence, in a subsequent suit by the same plaintiff against the witness, to prove that the loss did not result from the negligence of the ferry-keeper; and so a judgment for the plaintiff could not have been evidence in a subsequent suit for the witness, to prove that the loss was occasioned by the negligence of the ferry-keepers, and, therefore, could not have been the result of his misconduct.

The three cases cited in support of the opinion in the Steamboat Farmer v. McCraw, are Farwell v. Hilliard, 3 N. H. 318; Gilmore v. Carr, 2 Mass. 171, and Witmer v. Schlatter, 2 Rawle, 359. We have no opportunity to examine the Pennsylvania case. In the New Hampshire and Massachusetts cases, it is simply decided, that where

one has a distinct remedy for the recovery of a debt against two persons, a judgment against, and satisfaction by one, will discharge the other. In those cases, the judgment was evidence as a mere fact, necessary in making proof of payment, which was a good defense, with or without the judgment. In that sense, a judgment is evidence against all the world. But that is not the sense in which it must be evidence, in order to affect the competency of a witness under the Code.

The decision of this court, and the majority of the authorities elsewhere, are in favor of the proposition, that an agent or servant, having in his care the property of the plaintiff at the time when it is injured, is incompetent to testify for the principal or master, in a suit against a third person to recover damages for the injury, though there are respectable authorities the other way.—Otis & Jayne v. Thom, 23 Ala. 469; McGrew v. Governor, 19 Ala. 89; Bean v. Pearsall, 12 Ala. 592; Moore v. Henderson, 18 Ala. 232; Governor v. Gee, 19 Ala. 199; Barney v. Earle, 20 Ala. 465; Howell v. Cincinnati Ins. Co., 7 Ham. 401; Johnson v. Harth, 2 Bailey, 183; Dudley v. Bolles, 24 Wend. 465; see, also, the cases collected and discussed in the American note to Smith's Leading Cases, vol. 2, p. 54; and see C. & H.'s Notes to Phillips on Ev. (Part I) 145–152.

The incompetency is placed, in the adjudged cases, upon the reason, given by this court in the case of Otis & Jayne v. Thom, *supra*, that a judgment for the plaintiff would contribute to place the witness in a state of security, against any action which the plaintiff might bring against him; and not that the verdict and judgment would be evidence for him. On the contrary, it is said by this court, in Bean v. Pearsall, *supra*, that the judgment would not be evidence for the witness; and we find the authorities cited below concurring with what is said in that case.—1 Greenleaf on Ev. § 396; Harding v. Cobley, 6 Car. & P. 664; Mitchell v. Hunt, *ib.* 351; Harrington v. Caswell, *ib.* 352; Smith's Leading Cases, *supra*.

We are thus led by authority, as well as our reasoning, to the conclusion, that the older case of Bean v. Pearsall

is correct, in denying that the verdict and judgment would be evidence for the witness; and that the decision in the Steamboat Farmer v. McCraw, so far as it holds the contrary, is wrong. We, therefore, as to the point now under consideration, approve of and adhere to the doctrine of the older decision; and hold, that the court below did not err in ruling in favor of the competency of the witness.

7. The lessee of the ferry, who had charge of it under his lease, and was receiving tolls at the time of the loss of the plaintiff's property, was certainly bound to indemnify the lessor against any damage resulting from his negligence; and as the lessee had notice of the proceeding, he would not only be liable over to the defendants, but the verdict and judgment rendered against them would be evidence against him, and, if otherwise, evidence for him, completely shielding him against any suit by the plaintiff. 1 Greenleaf on Ev. §§ 393, 394.

The judgment of the court below is affirmed.

THOMPSON *vs.* CLOPTON.

[ACTION ON OPEN ACCOUNT COMMENCED IN JUSTICE'S COURT.]

1. *Waiver of plea in abatement to jurisdiction of justice.*—In an action commenced in a justice's court, if the defendant suffers judgment by default to be rendered against him, from which he takes an appeal to a jury, and afterwards removes the case by appeal to the circuit court, he cannot there plead in abatement on account of his being a freeholder and resident citizen of another county.

APPEAL from the Circuit Court of Benton.

Tried before the Hon. WILLIAM M. BROOKS.

THIS action was brought by Jesse Clopton, an infant, suing by his next friend, against Robert Thompson; and was commenced before a justice of the peace. The justice

rendered a judgment by default against the defendant, who afterwards took an appeal to a jury; and the jury having returned a verdict for the plaintiff, the defendant removed the case by appeal to the circuit court, and there pleaded in abatement that he was a freeholder and resident citizen of Tallapoosa county. The action of the circuit court in striking out this plea, to which the defendant excepted, is the only matter now assigned as error.

M. J. TURNLEY, for the appellant.
GEORGE C. WHATLEY, *contra.*

STONE, J.—If the appellant, at the time he was sued before the justice of the peace in Benton county, was a freeholder, and a resident citizen of another county, he had the clear right to plead these facts in abatement of the suit; and upon proving his plea, the necessary result would have been, that the court would have repudiated the cause. Whether, if the defendant had interposed this plea before the justice of the peace, and, failing to obtain a decision upon it in his favor, had there made an unsuccessful attempt to defend before the justice on the merits, he would thereby have abandoned the right to renew his plea in abatement after appealing to the circuit court, is a question which we need not decide in this case. Neither are we called on to decide whether, in a case commenced in a justice's court, and carried by appeal to the circuit court, the defendant, to entitle himself to make this defense in the latter court, must have interposed the plea in the justice's court.—See Read v. Coker, 1 Stew. 22; Clough v. Johnson, 9 Ala. 425.

The defendant, after the judgment was rendered against him by the justice, took an appeal, under a statute of force in that county, to a jury to be called before the justice. He there entered into a trial on the merits; and the result was, a verdict and judgment against him. This trial on the merits was had at his instance. It was not a proceeding into which he was forced by the act of the opposite party; and we hold, that this operated a

waiver by him of all objection to the jurisdiction of the courts of Benton county.—Lampley v. Beavers, 25 Ala. 534; Lea v. Thompson, 28 Ala. 454; Gager v. Gordon, 29 Ala. 344.

The circuit court did not err in striking out the plea in abatement, as the defendant had forfeited his right to interpose that defense.

The judgment of the circuit court is affirmed.

STETSON & CO. *vs.* GOLDSMITH.

[BILL IN EQUITY FOR INJUNCTION OF JUDGMENT AT LAW.]

1. *Trespass by levy of void legal process.*—A party who procures a sheriff to levy an attachment which is void on its face, is a trespasser.
3. *Equitable relief against judgment at law.*—A party against whom a judgment at law has been rendered, in an action of trespass, for procuring the levy of an attachment which was void on its face for want of authority on the part of the officer by whom it was issued, cannot obtain relief against it in equity, on the ground that the attachment was not sued out wrongfully or maliciously, but to prevent the apprehended loss of an existing debt; and that the decision of the supreme court, holding such attachment void for want of authority on the part of the officer by whom it was issued, had not then been pronounced, and was contrary to the practice and general understanding of the bench and bar.

APPEAL from the Chancery Court at Mobile.
Heard before the Hon. WADE KEYES.

THIS bill was filed by the appellants, against Meyer Goldsmith and others, and sought to enjoin a judgment at law for $5,000, which Goldsmith had obtained against them in an action of trespass. The alleged trespass, on which Goldsmith's action at law was founded, was the act of said Stetson & Co. in procuring the levy of an attachment on a stock of goods in the possession of Goldsmith. This attachment was in favor of Stetson & Co., against Goldsmith; was sued out on the ground that the

defendant had money, property and effects, liable to satisfy his debts, which he fraudulently withheld; and was issued by the clerk of the city court of Mobile, on the 11th March, 1855, which was prior to the decision of this court in Stevenson v. O'Hara, 27 Ala. 362, holding that such an attachment was void for want of authority in the clerk to issue it. The goods levied on were sold, under an order of court, as perishable property; the net proceeds of sale, amounting to $2,262 67, being paid into court. By a subsequent order of the court, $417 of this amount was paid to the landlord of the store in which the goods were found, for rent. On the 15th May, 1855, judgment by *nil dicit* was rendered against the defendant; an execution issued thereon was, on the 28th September, 1855, returned "no property found;" and the judgment is still unsatisfied. In the action brought by Goldsmith against Stetson & Co., judgment was rendered for the plaintiff, in May, 1856; and this judgment was affirmed on error by the supreme court at its January term, 1857.

The bill alleged, that the plaintiffs' attachment against Goldsmith was not sued out for the purpose of vexing or harassing him, but for good and sufficient cause, and to prevent the loss of a *bona fide* debt; that it was, at that time, customary with the clerk of the city court to issue original attachments,—his power to do so being unquestioned; that the question of his authority was first mooted in the case of Stevenson v. O'Hara, in 1855; that the city court decided in favor of his authority, but its judgment was reversed on error by the supreme court; that this decision of the supreme court had not been made when plaintiffs' said attachment was issued; and that it is contrary to the practice and common understanding of the bench and bar in Mobile, and has since been re-affirmed by a divided court, in Matthews, Finley & Co. v. Sands & Co., reported in 29 Ala. 136.

On the coming in of the answers, the chancellor made an interlocutory decree, ordering the injunction to be dissolved, unless the complainants, within five days after notice of the order, should pay to the assignees of Gold-

mith's judgment against them the amount due on said judgment, after deducting therefrom the amount claimed to have been paid to Goldsmith's landlord for rent, and the amount due to complainants on their judgment against Goldsmith; and requiring refunding bonds from the assignees, to abide the final determination of the cause. This decree is now assigned as error by the complainants.

K. B. SEWALL, for the appellants.

WM. BOYLES, *contra.*

RICE, C. J.—The interlocutory order appealed from did not dissolve the injunction unconditionally; but allowed the complainants to prevent the dissolution by paying, within five days after notice of the order, the balance of the judgment against them that might remain after deducting from that judgment "the amount of rent claimed to have been paid the landlord of defendant Goldsmith, and *the amount* claimed by complainants as set-off." If the complainants had paid the balance required of them by the order, the amount left in their hands of the judgment against them would have been equal to the amount of their judgment against Goldsmith, and the amount of the rent which they claimed they had paid to his landlord. It is clear that the complainants were not injured by the order, and have no right to its reversal, unless upon the allegations of the bill, and the responsive matter of the answers, they are entitled to a perpetual injunction of *the entire judgment* for damages obtained against them at law by Goldsmith.

That judgment is founded on a trespass committed by them, and virtually admitted in their bill.—Stevenson v. O'Hara, 27 Ala. R. 362; Matthews v. Sands, 29 *ib.* 136; Crumpton v. Newman, 12 *ib.* 199; Noles v. The State, 24 *ib.* 672. The matters relied on for an injunction of *the whole of it*, if available anywhere, were in their nature available at law. It is not established that the complainants were prevented from availing themselves of these matters at law, by fraud, accident, or the act of the oppo-

site party, *unmixed with negligence or fault on their part.* Ignorance, which was avoidable by reasonable diligence, cannot form any part of a complainant's title to relief in equity. No sufficient excuse for complainants' ignorance is established; and upon the allegations of the bill, and the responsive matter of the answers, a court of equity cannot relieve the complainants from the entire consequences of their admitted trespass. To do so, would amount to nothing less than the assertion of a power in that court to give indemnity to trespassers, against the consequences of their admitted trespass, in defiance of the most salutary public policy, and the best settled principles of law.—French v. Garner, 7 Porter, 549; Taliaferro v. Bank, 23 Ala. Rep. 755; White v. Ryan & Martin, at the present term; Aikin & Ten Eyck v. Satterlee, 1 Paige, 289.

The order appealed from is affirmed, at the costs of appellants.

SMITHA *vs.* CURETON.

[ACTION BY VENDOR FOR PRICE OF HORSE SOLD.]

1. *Admissibility of partner's declarations as evidence against co-partner.*—The declaration of one of the partners in a livery-stable, made during the existence of the partnership, to the effect that a horse purchased by him was bought for the firm, is admissible evidence for the vendor, in an action against the other partner, as survivor, to recover the price of the horse.
2. *Admissibility of declarations as part of res gestæ.*—The declarations of the purchaser of a horse, made after the consummation of the purchase, and when the vendor was not present, to the effect that he had won the horse, or had bought him on his own individual account, are not competent evidence against the vendor, in an action brought by him against a third person, as surviving partner of the firm of which the purchaser was a member, to recover the price of the horse.

APPEAL from the Circuit Court of Barbour.
Tried before the Hon. E. W. PETTUS.

E. C. Bullock, for appellant.

James L. Pugh, *contra*.

WALKER, J.—This action was brought by the appellee, to recover the price of a horse sold. The proof shows, that the defendant and one Wellborn were partners in the livery-stable business; and that the contract for the sale of the horse was made with Wellborn. The plaintiff was permitted to prove the admission of Wellborn, that he purchased the horse for the partnership. This admission appears from the bill of exceptions to have been made pending the partnership; and, it is probable, was made at the time of the sale of the horse. The admission of one partner, made during the partnership, in reference to a purchase for the partnership, is evidence against the other partner.—See the authorities collected in 1 Cowen & Hill's Notes to Phillipps on Ev. 174, note 177. A livery-stable is defined by the counsel for the appellant to be a place for the hire and keeping of horses. Adopting this definition of a livery-stable, we cannot intend that the purchase of horses for the stable is a transaction alien to the livery-stable business. Horses could not be kept for hire, unless they were bought, or in some other manner procured for the business. The witness expressly states, that it was admitted by the purchaser of the horse that he was needed for the stable, and was bought for that purpose.

The defendant offered to prove declarations, made by the person who bought horse, a day or two after the purchase was completed, and when the seller was not present, that the horse had been won from the seller. These declarations did not accompany the act of procuring the horse. They were descriptive of a past transaction, and cannot be deemed a part of the *res gestæ*.

The defendant also offered to prove the declarations of the purchaser of the horse, made by him after he had bought the horse, and when on his way returning from the place of purchase; which declarations were offered to prove that the horse was procured on the individual account of the purchaser. These declarations were

obnoxious to the same objection with those above noticed, and were properly excluded.

The judgment of the court below is affirmed.

FULLER *vs.* DEAN.

[ACTION FOR VERBAL SLANDER.]

1. *Admission implied from silence.*—In slander for words spoken, charging larceny, defendant cannot be allowed to prove that, prior to the speaking of the words alleged, a third person had made the same charge against plaintiff, and that plaintiff did not then deny the charge.
2. *Evidence of plaintiff's general bad character.*—In such action, issues being joined on the pleas of not guilty and justification, the defendant may prove, in mitigation of damages, that the plaintiff's general character for honesty, before the speaking of the words charged, was bad.
3. *Evidence of plaintiff's general reputation in respect to particular crime charged.* The fact that plaintiff was generally suspected in the neighborhood, before the speaking of the words by defendant, of the particular crime imputed to him by those words, is also admissible evidence for the defendant, in mitigation of damages, although the charge was unfounded in fact.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by William R. Fuller, against William Dean, to recover damages for the false and malicious speaking by defendant of certain words charging plaintiff with having stolen a sack of salt. The pleas were, not guilty, the statute of limitations of one year, and justification; the last plea being interposed, by consent, after the argument to the jury had commenced. On the trial, as appears from the bill of exceptions, the plaintiff proved that the words charged were spoken by the defendant on the 1st August, 1855, and had reference to a transaction which occurred at Claiborne in the year 1832. The defendant offered to prove by a witness, "that, in 1853, he (witness) told plaintiff to his face that he had

stolen a sack of salt, and he (witness) could prove it; and that plaintiff said nothing. This occurred after the witness and plaintiff had had a fight. The plaintiff objected to this evidence, but the court permitted it to go to the jury;" to which the plaintiff excepted.

"The defendant then examined a witness, who swore, that he knew the plaintiff's general character, particularly for honesty, prior and up to August, 1855, and knew it to be bad. Defendant then asked said witness this question: 'Do you know whether or not the plaintiff, before the speaking of the words by Dean about which you have testified, was or not generally suspected in the neighborhood in which [he] lived of having stolen a sack of salt.' The plaintiff objected to this question as illegal, unless it was preceded or accompanied by an admission on the part of the defendant that the charge was false; but the court overruled the objection, and allowed the question to be propounded to the witness, without requiring the defendant to make such admission; and the plaintiff excepted. The witness answered, that he was so suspected; to which answer the plaintiff objected, and moved the court to exclude it from the jury; but the court overruled the objection, and the plaintiff excepted. In admitting this evidence, the court stated, that it was admitted only in mitigation of damages."

The defendant introduced several witnesses, who testified, that the plaintiff's general character, particularly for honesty, prior and up to August, 1855, and as far back as 1832, was bad. This bad character was referred by one of the witnesses, partly, to a charge against him of having "sworn a lie about the entry of some land in the Choctaw purchase;" and by the others was attributed principally to the charge of having stolen a sack of salt, and partly to another charge of having stolen a five-dollar bill. This evidence appears to have been admitted without objection when it was offered; but, after the plea of justification had been interposed, in answer to an argument which plaintiff's counsel, in his opening speech to the jury, had drawn from the failure to put in that plea, the plaintiff's counsel moved the court "to exclude from the

jury all testimony in relation to the plaintiff's bad character subsequent to the year 1832, when the alleged stealing of the sack of salt occurred, and growing out of the alleged stealing of said sack of salt." The court overruled this motion, "and permitted the evidence to remain before the jury in mitigation of damages;" and the plaintiff excepted.

"The plaintiff asked the court to instruct the jury, that if they found from the evidence that the plea of justification was untrue, they cannot consider the plaintiff's bad character which had been produced in consequence of the charge of stealing said sack of salt, made prior to the speaking by defendant of the words charged in the complaint, even in mitigation of damages, if they found that the defendant spoke the words charged in the complaint maliciously; which charge the court refused to give, and the plaintiff excepted."

"The court charged the jury, that they could not look to the proof of the bad character of the plaintiff, acquired after the alleged stealing of the sack of salt in 1832, and before the utterance by defendant of the charge against the plaintiff, (if they found such bad character to have existed,) in ascertaining the truth or falsity of the plea of justification; but, if they found against the defendant on said plea, then they might look to such bad character, (if they found it existed,) in estimating the damages to which the plaintiff was entitled. To this charge the plaintiff excepted."

All the rulings of the court to which, as above shown, exceptions were reserved, are now assigned as error.

WATTS, JUDGE & JACKSON, for the appellant.

D. W. BAINE, *contra.*

STONE, J.—In considering the questions presented by this record, we attach no importance to the fact that the plea of justification was interposed after the evidence was given in, as the legal questions in either event are the same. For the purposes of this opinion, then, we will consider that the trial was had on three pleas: 1st, not guilty; 2d,

the statute of limitations of one year; and, 3d, justification.

The first exception questions the legality of the evidence introduced by the defendant, to the effect that, previous to the speaking of the slanderous words by him, another person had charged the plaintiff with having stolen a sack of salt, and that he (the plaintiff) did not deny the truth of the charge. We can see no principle on which this evidence was admissible, unless it be under the influence of the maxim, *qui tacet consentire videtur; an admission, inferred from acquiescence in the verbal statement of another.* In speaking of this kind of evidence, Mr. Greenleaf says: "It should always be received with caution; and never ought to be received at all, unless the evidence is of direct declarations of that kind which naturally calls for contradiction;" * * * "It may be impertinent, and best rebuked by silence."—1 Greenl. Ev. § 199. Now, we do not think the charge made in this case was of a nature to call for a reply; but, in the language of Mr. Greenleaf, we think it was impertinent, and best rebuked by silence. In admitting this evidence, the circuit court erred.—Lawson v. The State, 20 Ala. 65.

The remaining exceptions present substantially but two questions: 1st, whether, under these issues, it was competent for the defendant to prove, in mitigation of damages, that before the speaking of the words by Dean, the general character of the plaintiff for honesty was bad; and, 2d, whether it was competent, in mitigation, to prove, also before the speaking of the words charged, that Fuller was generally suspected, in the neighborhood in which he lived, of having stolen a sack of salt.

The first of these questions is answered in the affirmative, in Pope v. Welsh, 18 Ala. 631. The opinion of Parsons, J., in that case, is an able and well considered argument, fully sustained by authority; and we concur with him in his conclusions. We also concur with the court, in the case last cited, in disregarding the *dictum* found in the last paragraph of the opinion in Shelton v. Simmons, 12 Ala. 466.—See, also, Commons v. Walters, 1 Porter, 323; 2 Greenl. Ev. (6th ed.) § 424, and notes;

Eifert v. Sawyer, 2 Nott & McC. 511; Brunson v. Lynde, 1 Root, 354; Paddock v. Salisbury, 2 Cow. 811; Walcott v. Hall, 6 Mass. 514.

The case of Commons v. Walters, 1 Por. 323, also answers the second of the above questions in the affirmative. The case of Bradley v. Gibson, 9 Ala. 406, does not disturb the authority of Commons v. Walters. On the contrary, it impliedly re-affirms the doctrine. True, in the case of Bradley v. Gibson, *supra*, this court refused to receive evidence of a *report* that plaintiff had been *suspected* or *accused* of a particular offense. Proof that a party had been generally *suspected*, in the neighborhood, of an offense, is certainly a very different proposition from proof of a *report*, or *general report*, that he had been suspected, accused, or even *guilty* of such offense. There may be a report, or general report, that a party has been guilty of a certain offense; and that report may be so utterly disregarded, as that it does not cause the party to be generally suspected of guilt. The one may be idle rumor, while the other denotes confidence in the truth of the report, which of course would affect the party's general character. It is on this principle alone that the evidence is admissible. We re-affirm the doctrine settled in Commons v. Walters, *supra*.—2 Greenl. Ev. (6th ed.) § 424, note 1, on pp. 421–4; Earl of Leicester v. Walter, 2 Camp. 251; 2 Stark. on Slander, 88, and note pp. 89, 90, *et seq.;* Williams v. Mayor, 1 Binney, 92; Middleton v. Calloway, 2 A. K. Marsh. 372; Buford v. McLuny, 1 Nott & McC. 268; Hyde v. Bailey, 3 Conn. 466.

The case of Scott v. McKinnish, 15 Ala. 662, is not in conflict with this view.

What we have said above, in relation to the introduction of evidence, is decisive to show that the circuit court did not err, either in the charge given, or in the refusal to charge as asked. We think the charge asked, is a clear misapprehension of the rule. It is very true that a defendant shall not avail himself of the plaintiff's bad character, *caused by the slander uttered by himself*, to reduce the plaintiff's recovery. This would be to permit him to profit by his own wrong. It is equally clear, however,

that under no circumstances can the defendant be held accountable for damages to the character of the plaintiff, which are not traceable to the slander uttered by the defendant himself. If others, by uttering similar slanders, or imputing the same offense to the plaintiff, had tarnished his character before the slanderous words were uttered or repeated by defendant, proof that that first or former slander was false certainly should not have the effect of holding him who last repeated the words accountable for the combined injury to the plaintiff's character, caused, perhaps, mainly by the slander and malice of others. The vice of the charge consists in this, that it assumes erroneously that every slander uttered of the plaintiff, no matter by whom, or how often spoken, if it impute to him one and the same crime, is in law one and the same slander, and whoever repeats the charge is responsible for the whole.

For the single error above pointed out, the judgment of the circuit court is reversed, and the cause remanded.

STEAMBOAT FARMER *vs.* McCRAW.

[ATTACHMENT AGAINST STEAMBOAT FOR DAMAGES CAUSED BY COLLISION.]

1. *Constitutionality of statute giving attachment against steamboat.*—The act of January 17, 1844, (Session Acts 1843-4, p. 98,) giving a remedy by attachment against a steamboat, in the nature of a proceeding in admiralty, for damages caused by a collision, is not violative of any provision of the constitution of this State or of the United States.
2. *Former recovery and satisfaction.*—A recovery by a common carrier, for an injury to goods while in his possession, with satisfaction thereof, is a bar to an action by the owner of the goods for the same injury, provided the action of the carrier was commenced before that of the owner.
3. *Demurrer to plea.*—Where the sufficiency of a plea in bar depends upon the day on which the suit was commenced, and neither the plea nor the declaration shows the day, the court cannot, on demurrer, look to the teste of the writ.

4. *Competency of witness governed by what law.*—In a suit which was commenced before the adoption of the Code, the competency of witnesses is to be determined by the former law.
5. *Competency of part owner as witness for co-owner.*—In a statutory action against a steamboat, under the act of 1844, one of the part owners of the boat having intervened to defend, another part owner, who also joined in the replevy bond, is not a competent witness for the defendant.
6. *Waiver of objection to attachment and discontinuance.*—After a party, who has been allowed to intervene as defendant, has filed the plea of not guilty to the amended declaration, it is too late for him to move to quash the attachment by which the suit was commenced, or to dismiss the proceeding on account of a discontinuance.

APPEAL from the Circuit Court of Dallas.
Tried before the Hon. A. B. MOORE.

THIS action was commenced in May, 1852, by attachment against the steamboat *Farmer*, at the suit of Abner G. McCraw, to recover damages for injuries done to seventy-eight bales of cotton, belonging to plaintiff, by a collision between said steamboat and a flat-boat on which said cotton was shipped. At the fall term, 1852, the plaintiff filed a declaration against Edward F. Shields, Jacob B. Walker, and Daniel Walker, as owners of the steamboat; but this court, on appeal, at its January term, 1855, held that the declaration ought to have been against the boat itself; and for this error, with others, the judgment was reversed, and the cause remanded.—See 26 Ala. 189.

After the remandment of the cause, the original declaration was struck from the files, on motion of said Shields, J. B. and Daniel Walker, and an amended declaration filed against the steamboat itself. Said Shields and the Walkers then moved the court "for judgment in their favor, against the plaintiff, for the costs incurred by them in defending the suit;" which motion the court refused then to decide, "but continued, to be considered on the taxation of costs;" and the said parties excepted. Moses Waring, Joseph T. Hunter and Stephen Twelves "then moved the court to quash the replevy bond executed by them, with said Edward F. Shields, Jacob B. Walker and Daniel Walker, on the ground that said bond does not conform to the statute under which the attachment was

issued;" which motion the court refused, and they excepted.

At the same term, John S. Glidden intervened as one of the owners of the boat, was admitted to defend, interposed the plea of not guilty, and moved the court to quash the attachment, on the following grounds: "1st, because the plaintiff failed to give the bond required by the statute under which the attachment issued;" and, "2d, because there was no appraisement of the boat and her appurtenances, as required by the statute." He also moved the court to dismiss the attachment, "on the ground that there has been a discontinuance of the suit against the boat, by prosecuting the suit against other parties not now before the court, and failing to declare against the boat, or otherwise proceeding against her." The court overruled each of these motions, and said Glidden excepted to its rulings.

The record nowhere shows at what term of the court any of the proceedings above stated were had; said proceedings being all stated in a single minute entry, which ends with a continuance of the cause.

At the spring term, 1855, Glidden filed his answer and claim on behalf of the boat, and interposed four pleas. The first plea was, "not guilty, in short by consent;" and the others, which, with some immaterial discrepancies, were substantially the same, set up a former recovery and satisfaction in an action instituted by the owners of the flat-boat on which plaintiff's cotton was at the time of the collision with the steamboat. A demurrer was interposed, in short by consent, to each of these special pleas, and sustained by the court; aad a trial was then had on issue joined on the plea of not guilty.

On the trial, as appears from the bill of exceptions, "the defendant offered one E. F. Shields as a witness; to whom the plaintiff objected, on the ground that he was one of the makers of a bond, given at the time the attachment was levied, for the purposes specified therein. The object of said bond, as shown, was to replevy said steamboat, which was given up to the obligors, or some of them, on the execution of said bond. These facts appearing,

the court ruled, that said Shields was not a competent witness for the defendant, and refused to let him testify; to which said defendant excepted."

All the rulings of the court above stated are now assigned as error.

WM. M. BYRD, for appellants, made these points:

1. The act of 1844, under which this proceeding was instituted, is unconstitutional, being violative of those provisions which confer jurisdiction on the Federal courts. The Federal courts have exclusive jurisdiction over admiralty and maritime causes.—Genessee Chief v. Fitzhugh, 12 Howard, 443; Navigation Co. v. Merchants' Bank, 6 Howard, 344; Waring v. Clarke, 5 Howard, 441; Cahons v. Virginia, 6 Wheaton, 392; Slocum v. Maberry, 2 Wheaton, 9; Gelston v. Hoyt, 3 Wheaton, 312; Maley v. Shattuck, 10 Wheaton, 488; 3 Cranch, 458; 2 Cranch, 64; 9 Wheaton, 362; 7 Amer. Jur. 70; 2 Peters' Adm. R. 74, app.; 2 Bro. Civ. & Adm. Law, 144; 2 Hagg. 7; 2 Gallison, 398, 466; 1 Mason, 96; 3 Mason, 503; Paine's R. 111; 3 Wheaton, 546. The act of 1844 confers admiralty jurisdiction on the circuit courts of this State, and does not even limit that jurisdiction to collisions which occur within the limits of the State.—3 Wheaton, 336; 10 Wheaton, 473; 3 Mason, 242. The Federal courts have jurisdiction of all admiralty causes arising on the high seas, bays, and tide-waters of the country.—Curt. Com. 53–4; 3 Story's Com. §§ 1657–67. Their jurisdiction also extends to all admiralty causes arising on the navigable rivers of the State.—Curt. Com. 33–54; Story's Com. §§ 1657–67; 9 Wheaton, 421; 4 Cranch, 443; 4 Wheaton, 438; 7 Peters, 324.

2. The motions to quash or dismiss the attachment were made at the earliest moment after Glidden had been allowed to intervene for the boat; and up to that time there was no one in court authorized to make the motion.

3. The court erred in sustaining the demurrer to the special pleas. The demurrer that was interposed questions only the sufficiency of the matters pleaded, and raises the question, whether a recovery by a common car-

rier, for an injury to the goods while in his possession, is a bar to an action by the owner of the goods.—Steamboat Farmer v. McCraw, 26 Ala. 189; Story on Bailments, §§ 94, 148, 585; Parsons on Contracts, 633; 1 Iowa Rep. 411; Binney v. Barnes, 17 Conn. 420; 9 Humph. 342; 4 Miss. 243; 2 Sm. & Mar. 535; 8 Porter, 349; 21 Ala. 482; 1 Greenl. Ev. § 522. It was not necessary to state in the pleas the time when the action was commenced. It would not have been necessary, in a plea in abatement, to set out the date of the attachment, because the court would take judicial notice of it. Will not the court take judicial notice of the date of the writ, where the plea is in bar, and presents a meritorious defense?—Minor, 269; 2 Johns. 428; 2 Gill and J. 235; 2 Black. 178. This defect, moreover, if it be one, was only available on special demurrer, which, under the law existing when this action was commenced, had been abolished.—4 Porter, 348; 9 Johns. 314; 10 Ala. 313. Besides, the plea was in short by consent.—9 Porter, 145; 7 Ala. 791.

4. Shields was a competent witness for the defendants. The only ground of objection urged was, "that he was one of the makers of a bond given at the time the attachment was levied." Even if he is liable on the bond, he is a competent witness under the Code, because he could not make the verdict and judgment in this suit evidence for him in another suit. If the objection had been urged on the ground that he was shown by the recitals of the bond to be one of the part owners of the boat, it could have been disproved; and the recitals of the bond cannot now be looked to, to sustain the objection, which is unsupported by any other part of the record.

Jno. T. Morgan, *contra*.—1. The constitutionality of the statute, under which this action was instituted, is sustained by the decision of this court in Richardson v. Cleaveland, 5 Porter, 251, which has been acquiesced in in many other cases. The admiralty jurisdiction of the Federal courts extends only to vessels of over ten tons burthen navigating the seas or tide-waters.—Steamboat Orleans v. Forsyth, 11 Peters, 175.

2. The motions to quash and dismiss the attachment came too late.—Otis v. Thorn, 18 Ala. 395. The refusal to quash is not revisable on error.—Massey v. Walker, 8 Ala. 167; Ellison v. Mounts, 12 Ala. 472.

3. The special pleas, to which demurrers were sustained, were defective both in form and substance.

4. Shields was not a competent witness for the defendants, under the law which existed before the adoption of the Code.

RICE, C. J.—The case of Richardson v. Cleaveland, 5 Porter, 251, furnishes a complete answer to the argument here made for appellant against the constitutionality of the act of 17th January, 1844, under which the present suit was instituted. If the statutes passed upon in that case were constitutional, as we think they were correctly held to be, the act of 17th January, 1844, is also constitutional; and upon the authority of that case we hold the act last mentioned free from conflict, either with the constitution of this State, or of the United States.

A common carrier, who has received goods for the purpose of conveying them from one place to another, is not absolved from his liability to the owner, by the torts of third persons. Not only he, but also the owner, in virtue of his general ownership and right of possession, may maintain a suit against a stranger, for an injury to the goods. The general rule is, that either the bailor or the bailee may, in such a case, maintain a suit for redress; and a recovery and satisfaction by either may be pleaded in bar of any *subsequent* suit by the other, for the damages or loss from the same injury.—Story on Bailm. (5th ed.) § 94; Owners of Steamboat Farmer v. McCraw, 26 Ala. R. 189. But the suit by the general owner, for the injury to his goods, cannot be barred by a recovery and satisfaction by the bailee, in a suit commenced *after the suit* by the general owner. To impart to the recovery and satisfaction by the bailee the efficacy of a bar to the suit by the general owner, it is essential that the recovery and satisfaction be had in a suit commenced by the bailee *before* the commencement of the suit by the bailor.—Ren-

ner v. Marshal, 1 Wheaton, 216; Boune v. Joy, 9 Johns. 221; Morton v. Webb, 7 Vermont, 123; Combe v. Pitt, 3 Burrow, 1423; Haight v. Holley, 3 Wend. 258; Jenkins v. Pepoon, 2 Johns. Cases, 312; Everett v. Saltus, 15 Wend. 474; 1 Bacon's Abr. (edition ot 1846,) 28, 30, 32; Drake v. Reddington, 9 New Hamp. Rep. 243; Nicolls v. Bastard, 2 Cromp., Mees. & Rosc. 659; Wood v. Newton, 1 Wilson's R. 141; Fishburn v. Saunders, 1 Nott & McCord, 242.

In the special pleas to which, in this case, demurrers were sustained, the day on which the suit by the bailee was commenced is stated; but the day on which the present suit was commenced is not stated; nor is there any averment that the suit by the bailee was commenced *before* the present suit was commenced; nor is there any fact stated in the declaration, or in either of those special pleas, from which the court can say that the suit by the bailee was commenced *before* the present suit was commenced. On demurrer to those pleas, the court cannot, *in aid of them*, look back to the date of the writ in this case, but must decide upon the matters appearing on the face of the declaration and the several pleas.—Roberts v. Burke, 6 Ala. R. 348. The demurrer does not admit more than is alleged in the declaration and pleas.—7 Bacon's Abr. (edition of 1846,) 662. And as they do not show, on their face, that the suit by the bailee was commenced *before* the present suit was commenced, each of the pleas to which a demurrer was sustained, was bad; and therefore there was no error in sustaining the demurrers to them, even if in other respects they were unobjectionable,—as to which we do not decide. If the defendant was not bound to *allege in his pleas* that the suit by the bailee was commenced *before* this suit was commenced, he would not have been bound to *prove that fact*, if the plaintiff had taken issue on the pleas. But it is very certain that he ought not to be relieved from proof of that fact. Even the date of the writ is not conclusive evidence of the time when the action was commenced.—1 Chitty's Pl. (edition of 1844,) 259 *a*, 260, *and notes*. And on a demurrer to pleas, the court cannet try matters of fact—for

instance, whether one suit was really commenced before another.—Mansel on Demurrer, 96.

When, as here, the suit was commenced before the Code, the law of force at the commencement of the suit, and not the Code, furnishes the rule for determining the competency of the witnesses.—Frankenheimer v. Slocum, 24 Ala. R. 373; Doe, *ex dem.* Kennedy, v. Reynolds, 27 *ib.* 364; Hiscox v. Hendree, *ib.* 216; Chaney v. The State, at this term. As the witness Shields, offered by the defendant, was one of the owners of the steamboat Farmer, and was directly interested in the event of this suit; and as his interest was against the plaintiff, (see Hunter v. McCraw, at this term,) there was no error in holding him to be an incompetent witness for the defendant.

After Glidden had been allowed to intervene as an owner of the said steamboat, and *had filed the plea of not guilty to the amended declaration*, it was too late for him to make the motion to quash the attachment, or to dismiss it.—Hazard v. Jordan, 12 Ala. R. 180; Byrd v. McDaniel, 26 *ib.* 582; Burt v. Parish, 9 *ib.* 211; Burroughs v. Wright, 3 *ib.* 43.

If it be conceded, that on this record, we can revise the action of the court below on the motion made at the term the amended declaration was filed, by Shields, Jacob and Daniel Walker, for judgment in their favor against the plaintiff for their costs in defending, and on the motion made at the same term by Waring, Hunter and Twelves to quash the replevy bond; our opinion is, that there was no error in that action.—See Hunter v. McCraw, at the present term.

No right to a reversal is shown; and the judgment of the court below must be affirmed.

STEELE *vs.* McTYER'S ADM'R.

[CASE AGAINST COMMON CARRIERS FOR NEGLIGENCE.]

1. *Admissibility of defendant's declarations.*—Conceding that, in an action against the owners of a flat-boat, as common carriers, for negligence, the defendants may prove their instructions to the master of the boat not to take any freight until he reached a point on the river below that at which plaintiff's cotton was shipped; yet, they cannot be permitted to prove, that the reason assigned by them for such instructions, in the same conversation, was, that a full cargo for the boat had been already engaged at the points below.
2. *What constitutes common carriers.*—If the owners of a flat-boat hold themselves out to the public generally, though but for a single trip, and for part of a cargo only, as ready and willing to carry any cotton that may be shipped on their boat, they are liable as common carriers to persons who availed themselves of their services; but, if they do not thus constitute themselves the servants of the public, only proposing to carry the cotton of particular persons with whom they have contracted for a full cargo, they cannot be held liable as common carriers to a third person, with whom the master of the boat, in violation of their instructions, makes a contract for freight.
3. *Relevancy of evidence to prove contract of common carrier.*—The fact that the owners of a flat-boat were, in former years, engaged as common carriers in the transportation of cotton by flat-boats on the same river, is admissible but not conclusive evidence to show that they were acting in the same capacity in the particular contract in controversy.
4. *Liability of common carrier.*—A common carrier is responsible for a loss caused by the wreck of his flat-boat from running against a concealed log or snag in the river. (STONE, J., *dissenting.*)
5. *Admissibility of custom to affect bill of lading.*—Parol evidence is admissible, to show that, by a custom existing on a particular river, flat-boatmen were not responsible for a loss caused by dangers of the river, although the bill of lading contained no such exception.
6. *Requisites of custom.*—Whenever there is conflicting evidence as to the existence of a particular custom, the jury should be instructed, that a custom, to be valid and binding, must be uniform, and so generally known and acquiesced in, and so well established, that the parties must be presumed to have contracted in reference to it.

APPEAL from the Circuit Court of Perry.
Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by William McTyer, against John C. Steele, William Hendrix, and William S. Hanna, as common carriers, to recover damages for the loss of fifteen bales of cotton, which were shipped by plaintiff on

board of a flat-boat belonging to defendants, consigned to McDowell, Withers & Co. at Mobile. In consequence of the rulings of the court on the first trial, the plaintiff was compelled to take a nonsuit; which was set aside by this court, at its January term, 1855, and the cause remanded. See the case reported in 26 Ala. 487.

One count of the declaration alleged, that the contract for the transportation of plaintiff's cotton was made with said John C. Steele, acting for and on behalf of himself and the other defendants; and set out the receipt, or bill of lading, which was signed by said Steele, and a copy of which may be seen in the former report of the case. After the remandment of the cause, the defendants Hendrix and Hanna pleaded *non est factum* to this bill of lading; to which plea the court sustained a demurrer, and refused to visit the demurrer on the declaration. To these rulings of the court exceptions were reserved.

On the last trial, as appears from the bill of exceptions reserved by the defendants, the plaintiff introduced evidence tending to show that the flat-boat was built near Centreville in Bibb county, under a contract with said Steele, and was paid for by him and the other defendants; that it was brought down the river, when finished, by said Steele, who acted as the master or pilot; that the plaintiff's cotton was shipped on board of said boat in Bibb county, where other cotton belonging to one Massey was also put on board; that the boat proceeded down the river, and took on board cotton belonging to N. Lockett and J. Nave, at their respective landings on the river in Perry county; and that it was afterwards run on a log or snag in the river, in Perry county, and sunk. The evidence in relation to the loss of the boat is thus stated in the bill of exceptions: "The plaintiff proved, that said boat struck the log about 5 o'clock in the evening of the day; that there was room enough on either side of the log for boats to pass; that several witnesses had, for many years, known that there was a log in the river at or about that place; that two pilots, who were introduced as witnesses by him, and who had run on said river for many years, knew of a log at that point in the river; that one Belcher,

a pilot, had taken down a float-boat safely at about 11 o'clock of that day; that the river was then falling, and, as he passed the place where defendants' boat struck the log, he saw several feet of the top of the log, but could not see the body of it on account of the depth of the water; that Henry Johns, an experienced pilot, took another boat down the river, and passed defendants' boat on the log while they were trying to save the cotton; that said Johns had known the log for years, and a considerable portion of it was visible above the water when he passed; and that three other boats passed down the river safely, on the day after the disaster to defendants' boat, passing on the east side of the log. The witnesses stated, that the root of the log caused a ripple in the water, by which its position could be known; and that most of the log was covered by the water. The defendants proved, that the place where said boat was wrecked was one of very dangerous and difficult navigation, and was generally known to be so by persons acquainted with said river; that said Steele was a good and experienced pilot, and O'Brien a good bow-oarsman, and both had been engaged in flat-boating cotton down the Cahaba for many years; that said boat had on board twelve good and efficient hands,—eight or nine being about the usual number for managing a boat of that size. O'Brien, one of the oarsmen on said boat, testified, that the boat was well and skillfully managed, and was wrecked on said log by what he called inevitable accident; that the water ran over the log, and concealed it where it ran over it; that he did not see the log until the boat struck it, and did not know whether Steele saw it, or knew where it was, or even that there was a log in that place; that he saw the boiling of the water, but it did not show how the log lay; that the boiling was at or over the root of the log, some distance from where the boat struck it; that immediately after passing a dangerous place just above said log, an officer on the boat cried out, 'All safe;' that Steele then gave way on his oar, and immediately afterwards the boat swung around, and struck the log."

Evidence was introduced by the defendants, tending to

show that flat-boats, similar to theirs, never carried more than one load of cotton or other produce down the river to Mobile; that after reaching Mobile, they were sold for lumber, or cut up and sold for fuel; "that it was usual for persons carrying cotton down said river on flat-boats to engage the same before starting, and to take no other cotton, unless they were hailed as they went down, and requested to receive cotton from the banks of the river; that unless the cotton was so engaged, or the manager or owner of the boat was requested to take it, no cotton was ever taken on board such boats; that the captain or manager of the boat, when hailed, took cotton from the banks, and receipted for it;" that defendant Hendrix had engaged to take down Lockett's cotton on said boat, but the cotton of Nave and plaintiff was taken on board without any prior contract; that Hendrix and Hanna were the owners of said boat, and Steele was only their pilot. The defendants proved by one Marsh, "that when Steele was going up to Bibb county for the boat, Hendrix told him not to take any cotton until he got down to Lockett's landing; and then proposed to prove that, in the same conversation, Hendrix stated to Steele that they had a load of cotton engaged at said landing and below it on the river, and that this was the reason why he wished him not to take on any above." The court excluded this evidence, on the plaintiff's objection, and the defendant excepted.

The defendants offered to prove, that said W. S. Hanna, on the day after the accident to the boat, on being informed of the accident, engaged a steamboat, to go up to the wreck, and assist in saving the cotton; and offered to pay the steamboat $2 per bale for saving and freighting the cotton to Mobile. The court excluded this evidence, on the plaintiff's objection, "and would not permit the defendants to prove what price said Hanna had offered the steamboat for her services;" and the defendants excepted.

The defendants introduced several witnesses, who testified to the existence of a custom on the Cahaba river, exempting flat-boats from liability for losses which occur

red from dangers of the river; that this exception was sometimes expressed in the bill of lading, and sometimes omitted,—the liability of the carrier being in each case the same. On the other hand, the plaintiff introduced several witnesses, who testified that, though they had been engaged in freighting cotton down said river many years, they had never heard of the existence of such a custom, or of any other custom exempting flat-boats from common-law liabilities as carriers. The bill of lading in this case contained no express exception.

The court charged the jury as follows:

"That if Hendrix and Hanna were partners, engaged in the business of transporting cotton on flat-boats down the Cahaba and Alabama rivers to Mobile for hire, and had purchased the boat in question for that purpose, and had constituted Steele their agent to receive the boat and navigate it to Mobile as captain; and that said Steele, in that capacity, executed to plaintiff the bill of lading described in the declaration, and received the cotton therein mentioned on board of the boat, to be transported to Mobile as therein stated,—then Hendrix and Hanna were bound by the contract so made by Steele; and if the cotton was not delivered in Mobile, but was lost by the wreck of the boat on the river, under the circumstances detailed by the witnesses, they were liable to plaintiff for the same; and that there was not before the jury any sufficient evidence to establish a custom which exempted them from such liability."

To this charge said Hendrix and Hanna excepted, and requested the court to charge the jury:

"1. That if they believed from the evidence that the boat was well managed up to the time when the cry was made that all was safe, and that it was not then in the power of human agency to avoid the log on which the boat was wrecked, and that said log was concealed, and not generally known to pilots accustomed to run the river, and that there was no evidence to show that said log was known to the officers or hands of the boat,—then the plaintiff could not recover.

"2. That the plaintiff could not recover, unless the jury

were satisfied that there was negligence in the management of said boat, which caused it to run on said log and become wrecked.

"3. That if they believed from the evidence that the boat, on account of the wrecking of which this action was brought, was a flat-boat, constructed and procured by Hendrix and Hanna for the purpose of being carried to Mobile for a single trip, and had never been used before; that the cotton which Hendrix and Hanna, the owners, intended to transport on said boat, was engaged beforehand by them from the owners thereof; and that there was no evidence to show that the managers of said boat were bound to take any cotton that might be offered to them on their trip down the river, on tender of the payment of freight,—then the defendants were not common carriers, and the law would not hold them responsible as such.

"4. That the defendants, under the evidence introduced before the jury, were not common carriers in law.

"5. That if the jury believed from the evidence that Hendrix and Hanna were the owners of the boat; that Steele was instructed to go up the river, and bring down said boat, but not to take any cotton on board until he got down to Lockett's gin-house on the river; that said Steele did go up for said boat, and on the way down the river, before reaching said Lockett's gin-house, took plaintiff's cotton on board of the boat, and the same was afterwards lost,—then said Hendrix and Hanna were not liable therefor.

"6. That if Hendrix and Hanna were not engaged in the business of common carriers in the county of Bibb at the time plaintiff's cotton was taken on their boat, and had engaged a load of cotton for it in the county of Perry; and if said Steele was merely the captain of the boat, and contracted for and received plaintiff's cotton on the boat in Bibb county, contrary to the instructions of Hendrix and Hanna,—then said Hendrix and Hanna are not responsible, unless they adopted the contract with full knowledge thereof.

"7. That if there was no proof of a custom, as to the

authority of a pilot or master to give receipts binding the owners of the boats on the Cahaba river, and the defendants Hendrix and Hanna had never allowed Steele to give receipts for them, but always either gave receipts themselves, or sent an agent other than Steele with their boats to give receipts,—then said Hendrix and Hanna would not be bound by the receipt given in this case by Steele.

"8. That if Steele was simply the pilot of the boat, and Hendrix and Hanna sent him up the river for the boat, with instructions not to take any cotton on board until he had brought the boat down to Lockett's; and if he was authorized only to take on board the cotton which Hendrix and Hanna had engaged for the boat, but, in opposition to the instructions of Hendrix and Hanna, contracted for plaintiff's cotton, and received it on the boat, without the knowledge or consent of Hendrix and Hanna; and if it did not appear that they adopted the act,—then they are not liable for the loss or injury to the cotton."

The court refused each of these charges, and said Hendrix and Hanna excepted; and they now assign as error all the rulings of the court, as above stated, to which they reserved exceptions.

BROOKS & GARROTT, for the appellants.

WM. M. BYRD, and J. R. JOHN, *contra.*

WALKER, J.—In the argument of appellants' counsel no defect in the declaration is pointed out, and none has been detected by us. We decide, therefore, that there was no error in the failure to visit upon the declaration the demurrer to the defendants' plea.

That one of the defendants, after the disaster to the boat, offered, under the circumstances stated, to pay two dollars per bale for the services of a steamboat in saving and freighting the cotton to Mobile, was not evidence, for the exclusion of which the appellants can complain, and there was no error in rejecting such evidence.

The court permitted the defendants to prove, that instruc-

tions were given by one of the owners, to the master of the boat, that he should not take on board any cotton until he got to Lockett's landing, a point below that at which the plaintiff's cotton was received; and it was then proposed to show, that, in the same conversation, the master was informed, that a load was engaged at Lockett's landing, and at points below on the river, and that that was the reason why it was desired he should receive no cotton above Lockett's landing. This latter proof the court properly rejected; for, conceding that it was competent to prove the previous engagement of a load at and below Lockett's landing, it was not permissible to make the proof by the introduction of the defendants' declarations. If the defendants had a right to give in evidence the instructions to the master of the boat, it was not permissible for them to make that a pretext by which to obtain the benefit of declarations as to facts made at the same time.

The American decisions are conflicting as to what constitutes a common carrier. We have examined those, as well as many English cases; and, without reviewing them, we announce our conclusions. If the appellants built or procured a flat-boat, with which to carry cotton down the Cahaba river, and thence to Mobile, though only for a single trip, and held themselves out as ready and willing to carry cotton on their boat for the people generally who wished to send their cotton to Mobile, then they would be common carriers, and those who placed cotton upon the boat could not be affected by any private instructions, which might have been given to the master of the boat, as to the point on the river above which he was to take on no cotton. On the contrary, if the appellants did not hold themselves out as ready and willing to carry cotton for the public generally, to the extent of a proper load for the boat; or, in other words, did not constitute themselves the servants of the public in that business, but only proposed to take the cotton of some particular persons, with whom engagements were made, they were not common carriers. If the appellants, having engaged a part of the loading for the boat, held themselves

out as ready to carry for any person or persons to the extent of the remaining capacity of the boat, then they would be liable as common carriers to such persons as availed themselves of such offer of their services to the public generally as carriers. These questions, under the proof, should have been left to the jury, and the court erred in not giving the third and sixth charges asked. We cite the authorities bearing on this branch of the case: 1 Parsons on Contracts, 639; Dwight v. Brewster, 1 Pick. 50; Robinson v. Dunmore, 3 B. & P. 417; Edwards on Bailments, 425–432; Satterlee v. Groat, 1 Wend. 272; Jackson's case, 1 Haywood, 14; 2 Kent's Com. 598–599; Gisbourn v. Hurst, 1 Salkeld, 249; Ward v. Green, 6 Cow. 173; Johnson v. Midland Railway Co., 4 Ex. 367; Campbell v. Morse, Harper's Law R. 468; Samms v. Stewart & McKibben, 20 Ohio, 69; Notes to Coggs v. Bernard, 1 Smith's L. C. 82; Fish v. Chapman, 2 Kelly, 349; Lane v. Cotten, 12 Mod. 472; Angell on Carriers, 71–76.

The evidence that the defendants had been, in former years, engaged for the public generally in the transportation of cotton to Mobile on flat-boats, would be proper for the consideration of the jury in determining the question, whether they were common carriers; but it would not necessarily be conclusive. It might be that, notwithstanding they had previously acted as common carriers, they had abandoned the service of the public, and were simply engaged in the execution of special contracts. To constitute them common carriers, they must be engaged in the service of the public.

The wreck of the boat, upon the log described in the evidence, would not be a loss from the "act of God." Certainly it may have been, in some sense, by the act of God that the tree was thrown from its erect position, and became fixed at the place where the boat struck it. But then it was not the act of God which caused the boat to impinge upon that log. The act of God was, at most, but a remote agency in the production of the loss; while the human act of directing the boat against the log was the immediate and direct cause of the loss. This court said,

nearly twenty-five years ago: "The acts of God, or the inevitable accidents, which constitute a legal excuse, must be the immediate, not the remote cause of the loss." Sprowl v. Keller, 4 Stewart & Porter, 382; Jones v. Pitcher, 3 Stewart & Porter, 135. By the principle thus enunciated by this court, the writer of this opinion is willing to abide. To throw the *onus* of proving negligence upon the owner of the freight, in every case where loss might be occasioned by the striking of a hidden obstruction placed by the hand of nature, would emasculate the rule which governs the liability of common carriers, and practically abrogate the distinction between the act of God and dangers of the river. I am aware that, in some of the American courts, a disposition has been manifested to soften the stern rule of liability, visited upon common carriers; but I find it sanctioned by the authority of the common law, long declared a necessity of commerce, and founded in sound and wise policy, and think it should be maintained in its integrity, without any yielding to the hardships of particular cases.—Coggs v. Bernard, 1 Smith's L. Cases, 82, and notes of Hare & Wallace; 1 Parsons on Contracts, 634; Edwards on Bailments, 454; McArthur v. Sears, 21 Wend. 190; Angell on Carriers, § 154; Gordon & Walker v. Buchanan & Porterfield, 5 Yerger, 71–83; Fish v. Chapman & Ross, 2 Kelly, 349; 2 Kent's Com. 602–603; Abbot on Shipping, 382; Turney v. Wilson, 7 Yerger, 340.

We decline to overrule the decision of this court in Ezell v. Miller, 6 Porter, 307.—See the decision, at this term, in the case of Hibler v. McCarty, where a similar question is considered. It was, therefore, competent for the defendants to establish the custom, which they claim to have existed. There was some proof conducing to show such custom; and even though it may have seemed to the court to have been totally insufficient, or counterbalanced by other testimony, it should have been left to the jury. The jury should, however, in all such cases, be carefully instructed, that to constitute a good custom, it is requisite that it should have been uniform, and so generally known and acquiesced in, and so well

established, that the parties must be presumed to have contracted in reference to them.—Partridge v. Forsyth, 29 Ala. 202; Ala. & Tenn. Rivers Railroad Co. v. Kidd, 29 Ala. 226; Price v. White, 9 Ala. 563; Barlow v. Lambert, 28 Ala. 704.

What we have said settles the questions of law arising in the case, and will be sufficient to guide the court below in a future trial.

The judgment of the court below is reversed, and the cause remanded.

STONE, J.—In the case of the Coosa River Steamboat Company v. Barclay & Henderson, in manuscript, I expressed my views on the proper construction of the phrase "act of God," as applicable to the liability of common carriers. C. J. Rice and myself did not concur on that question, and the result was that that case was affirmed by a divided court. Judge Walker did not sit in that case.

In the present case, Judge Walker and myself are alone competent to sit. He now expresses a concurrence with Chief Justice Rice on this question, and it follows that theirs is now the expressed opinion of the majority of the court.

Although I have not changed my opinion, I now feel it my duty to permit their opinion of the law to become the judgment in this cause.

RICE, C. J., not sitting.

NOWLIN *vs.* McCALLEY.

[MOTION AGAINST SHERIFF FOR FAILURE TO COLLECT MILITIA FINES.]

1. *Courts-martial held courts of special jurisdiction.*—Under the military code of this State, courts-martial are courts of special and limited jurisdiction; and, consequently, the validity of their proceedings is to be tested by the rules applicable to other courts of limited jurisdiction.
2. *Jurisdiction of battalion court-martial.*—A battalion court-martial can only try defaulters at battalion musters: it has no jurisdiction to assess a fine against a person for refusing to accept an appointment as captain, and neglecting to fill vacancies in his company by election or appointment; nor for his failure to attend in person, and neglecting to order the defaulters of his company to attend, the court-martial by which the fine is imposed; nor for his failure to present to the court-martial, or to his superior officers, a muster-roll of his company.
3. *Jurisdiction of circuit court as to amount.*—A motion against a sheriff, for failing to collect a fine assessed by a court-martial, cannot be made in the circuit court, when the amount of the fine is less than fifty dollars.

APPEAL from the Circuit Court of Madison.
Tried before the Hon. NAT. COOK.

THIS proceeding was instituted under the 13th chapter of the Military Code of Alabama, in the name of William J. McCalley, as paymaster of the 33d regiment of militia, against David S. Nowlin, as sheriff of Madison county, for his failure to collect several fines, amounting to $64, which had been assessed by a court-martial against Capt. Albert P. Boone. The court-martial by which the fines were assessed, is described in the opinion of the court. The charges preferred against Capt. Boone, for which the fines were imposed, were as follows: 1st, failing and refusing to assume the command of a company, of which he had been appointed captain by Maj. Sanderson, and to fill to vacancies afterwards occurring in the company; 2d, failing to attend the battalion drill and muster, to give his officers and men notice of the drill and muster, and to appoint his non-commissioned officers; 3d, failing to attend the court-martial by which the fines were assessed, which he had been notified to attend; and, 4th, failing to

return to the court, or to his superior officers, a muster-roll of his company, showing the number of defaulters, &c. On the first charge he was fined $5; on the second, $25; on the third, $4; and on the fourth, $30. The certificate of the president of the court-martial, showing the fines assessed against Capt. Boone and others, was placed in the hands of the defendant, that he might collect the fines; and, at the same time, the proceedings of the court-martial were exhibited to him. Many questions were raised in the court below, respecting the admissibility of evidence, the jurisdiction of the court-martial, and the regularity of its proceedings; none of which, however, require special notice. The court charged the jury, "that if said Boone resided in Madison county, and had sufficient property out of which the sheriff might have made the amount of said fines; and if the defendant was the sheriff of said county, and as such received the certificate of fines read in evidence, and could have collected said fines by the use of ordinary diligence, but failed to do so, —then the plaintiff was entitled to recover in this motion the amount of said fines, with ten per cent. damages thereon;" to which charge the defendant excepted, and which, with other matters, he now assigns as error.

ROBINSON & JONES, for the appellant.
WALKER, CABANISS & BRICKELL, *contra*.

STONE, J.—Under our Military Code, as adopted by joint resolution Feb. 10, 1852, various grades of courts-martial, with varying powers, are provided for. The one in which these proceedings originated was a battalion court-martial, under chapter X, section 8, of that code. We thus characterize this court, for the following reasons: 1st, the certificate of fines, furnished to the sheriff, has this caption, "List of fines assessed at a battalion court-martial," &c.; 2d, the president of the court certified the proceedings as those of a battalion court-martial; 3d, the caption to the specifications preferred against Captain Boone gives the same designation to the court. Indeed, the entire record leaves no room for doubt that this was

a battalion court-martial, and we shall treat its proceedings accordingly.

Let us now inquire to what extent this battalion court-martial was authorized to assess the fines which it did assess against Capt. Boone. The authority for holding this court is conferred in the following language: "There shall be holden battalion courts-martial, for the trial of defaulters at battalion musters; which courts-martial shall be ordered by the commanding officers of battalions, and held within twenty days after the respective battalion musters, and shall consist of not less than seven commissioned officers."—Chapt. X, § 8.—We find no other provision of the code which authorizes battalion courts-martial, or defines their powers.

Courts-martial are courts of special and limited jurisdiction.—Mills v. Martin, 19 Johns. 7; Brooks v. Adams, 11 Pick. 441; Hall v. Howd, 10 Conn. 514. Applying, then, the rules governing special and limited jurisdictions to the facts of the case, what are we to understand by the expression, "defaulters at battalion musters?" Chapter X of the Military Code provides for military courts. Section 3 prescribes the regulations under which said courts shall be detailed, "whenever charges shall be preferred against any officer, non-commissioned officer, musician, or private." The courts provided for in this section sit on special cases in which "charges are preferred." They are separate from, and independent of the annual "brigade courts-martial," directed by section 4; "regimental courts-martial," as directed by section 7; "battalion courts-martial," by section 8; and "company courts-martial," by section 9. These last mentioned courts are a permanent institution, required to be held within a given period after the several musters or trainings to which they appertain.

The powers of a battalion court-martial are much more restricted than those of a regimental court-martial. While the former can only try defaulters *at battalion musters*, the latter are authorized to try and punish defaulters at regimental trainings, and for any other "offense of omission or commission against the military laws of this State at

such training, or previous thereto and subsequent to the previous annual training of such regiment, which shall be punishable by fine, except such offenses as shall be cognizable before a company or battalion court-martial, unless brought up by appeal."—Chap. X, § 7.

We feel constrained by the language of the code above copied, to hold that the powers of battalion courts-martial are limited to defaults at the battalion musters; and that for the trial and punishment of all military offenses, other than those over which jurisdiction is specially conferred on battalion and company courts-martial, (§§ 8 and 9,) the authority of the court must be derived either from section 3 or section 7.

Having thus laid down the extent of power which this military court could rightfully exercise, let us inquire, what offenses of Capt. Boone were committed at the *battalion muster?* To no greater extent had the court jurisdiction of them.

The first and third of the specifications preferred against Captain Boone fall entirely without this rule. Neither of said specifications alleges a default committed at the battalion muster, either in whole or in part. The fourth specification falls also entirely without the rule. The default there complained of was committed, if at all, at the very court-martial at which he was being tried.

In addition to the reason above stated, we may add, that to impose a fine against any defaulter, for failing to attend the court-martial at which such fine is imposed, would deprive the defaulter of the right to "make affidavit that he had no knowledge thereof [of the court-martial] in time to reach the place of holding said court."—See chapt. X, § 16. This provision evidently contemplates, that such default shall not be tried until a subsequent court is convened.

The 2d specification is, in part, for a default committed at the battalion muster, and in part for prior defaults. As the record affords no *data* for determining what part of this fine was imposed for the one, and what for the other default, if it were necessary to the decision of this case we would probably feel it our duty to hold this

amercement illegal. We need not, however, decide this question.

The fine assessed under the 2d specification is twenty-five dollars. Even if there were no question about the jurisdiction of the military court as to this particular fine, the amount of it fails to confer on the circuit court jurisdiction of this motion against the sheriff. The only statute which authorizes this proceeding, is section 6 of chapter XIII. It designates as the forum in which the motion shall be made, "any court having jurisdiction of the amount." Circuit courts have no original jurisdiction, unless the matter or sum in controversy exceeds fifty dollars.—Constitution of Ala., Art. V, § 6; Cahuzac v. Samini, 29 Ala. 288; see, also, Military Code, chapt. XV, § 4.

We have thus shown that more than half the amount of the fines assessed against Capt. Boone were imposed by a court having no jurisdiction of the offenses charged; and that, as to the balance, the circuit court had no jurisdiction of the motion against the sheriff. Another question it may be proper to notice.

It may be contended that the certificate of fines in this case appeared to be regular on its face; and that, in such case, the sheriff, if he had levied on the property of Capt. Boone, could have justified under said certificate, as the process under which he was acting. This legal principle might be conceded, without affecting the result of this case.—See Cow. & Hill's Notes to Phill. Ev. (ed. by Van Cott,) Part II, p. 201. A very different rule, however, prevails, when the attempt is made to proceed against the sheriff for not executing process issued on a void judgment. It is a perfect defense to such ministerial officer, that the process, with the failure to execute which he is charged, is void on its face, or that it issued on a judgment which is void for defect of jurisdiction. See Forward v. Marsh, 18 Ala. 645; Allen v. Ward, 8 Mass. 79.

It may be doubtful whether the sheriff could have justified under the certificate of fines, if he had made a levy. At the time when that paper was placed in his hands,

the proceedings of the court-martial were shown to him. Those proceedings gave him notice of the defaults for which Capt. Boone had been fined, and the military court by which the fines were imposed. Whether he was required to decide upon the validity of the proceedings, or whether he would have been justified under the circumstances in making a levy, we need not now determine. See Duckworth v. Johnson, 7 Ala. 578; Forward v. Marsh, *supra;* Cow. & Hill's Notes, (by Van Cott,) 2d part, pp. 200–1, 832–3; Allen v. Ward, *supra.*

The judgment of the circuit court is reversed, and the cause remanded.

ROBERTS *vs.* FLEMING.

[ACTION FOR BREACH OF WARRANTY OF SOUNDNESS OF SLAVE.]

1. *Motion to suppress deposition on account of defects in commissioner's return.* Where a commissioner certifies, that the witness was personally known to him, "and, after being duly sworn, deposed as set forth above in his answers to the annexed interrogatories; and that said answers, as above set forth, were reduced to writing, read over to, approved, and signed by said witness" in his presence,—the certificate shows a substantial compliance with the requisitions of the statute, (Code, §§ 2322–23,) and, in the absence of evidence to the contrary, is presumptive evidence that the commissioner did his duty in the execution of the commission.
2. *Opinion of physician as to value of slave.*—A physician who has some knowledge (though but limited) of the value of slaves, and who has examined and prescribed for the slave in controversy, may state that "her medical bill, for attention to her, would exceed the profit she could render her owner."
3. *Amendment of complaint.*—Where an amendment of the complaint is allowed against the objection of the defendant, and afterwards withdrawn, by leave of the court, because it made the complaint demurrable for a misjoinder of causes of action, there is nothing in this of which the defendant can take advantage on error.
4. *Measure of damages for breach of warranty of soundness of slave.*—In an action to recover damages for the breach of a warranty of soundness of a slave, whose unsoundness rendered her entirely valueless, the purchaser is entitled to recover the amount paid by him for reasonable and proper charges for care and attention to the slave, with interest from the time of payment.

5. *Sufficiency of complaint.*—In an action, under the Code, to recover damages for the breach of a warranty of soundness of a slave, it is not necessary to allege in the complaint, as special damages, expenditures made by plaintiff for reasonable and proper medical care and attendance.

APPEAL from the Circuit Court of Talladega.
Tried before the Hon. E. W. PETTUS.

THIS action was brought by Thos. G. Fleming, against Joseph M. Roberts, to recover damages for the defendant's breach of warranty of the soundness of a slave, named Frances, bought by plaintiff from defendant in December, 1853. The bill of sale for the slave was in the usual form, recited a consideration of $1000 as the price, and contained a warranty both of soundness and title, in the usual form.

Before entering on the trial, as appears from the bill of exceptions, the defendant moved the court to suppress the depositions of Dr. E. D. Connor and William G. Lancaster, which had been taken on interrogatories and cross-interrogatories. The specified grounds of objection to each deposition were,—"1st, that the commissioner does not certify the manner of taking said deposition; 2d, because said commissioner does not certify that said witness was first sworn by him to speak the truth, the whole truth, and nothing but the truth; and, 3d, because said commissioner does not certify that he reduced the answers of the witness to writing, or caused it to be done by the witness himself or some other impartial person, as near as may be in the language of the witness." The final certificate attached by the commissioner to each deposition was the same, and was in the following form: "By virtue of the commission hereto annexed, I have this 7th October, 1854, at the office of Clarke & Terrell, in the town of Dayton in said county, caused the above named E. D. Connor," [or Wm. G. Lancaster,] "the witness in said commission named, who is personally known to me, to come before me; who, after being duly sworn, deposed as set forth above in his answers to the annexed interrogatories; that his said answers, as above set forth, were reduced to writing, read over to, approved, and signed by said witness in my presence.

Given under my hand and seal," &c. The court refused to suppress either deposition, and the defendant excepted.

Dr. Connor testified to his examination of the slave in controversy, about six weeks after plaintiff's purchase of her, and to the diseased condition in which he then found her; and, in a portion of his answer to the third interrogatory, used this language: "*Were I not a medical man, I would not have her*, as the medical bill for attention to her would exceed the profit she could render her owner." To each portion of this answer the defendant objected, and moved the court to exclude it from the jury. The court suppressed the italicized portion, but refused to suppress the remaining portion; and to this the defendant excepted.

After the argument to the jury had commenced, and during the closing argument for the plaintiff, "it was suggested by the court that, under the pleadings as they then stood, the plaintiff could not recover the purchase-money, as upon a rescission of the contract." The plaintiff then asked leave to amend his complaint, by inserting the common counts; to which the defendant objected, and also excepted to the overruling of his objection and the allowance of the amendment. After the amendment of the complaint by the addition of the common counts, the defendant demurred to it, "on the ground that the common counts could not be joined with a count on a contract on which a special breach had been assigned." The court then granted leave to the plaintiff to withdraw his amendment, and it was accordingly withdrawn; to which also the defendant excepted.

The court charged the jury as follows: "That if they believed defendant sold to plaintiff the slave mentioned in the bill of sale, and warranted her to be sound; and that said slave was unsound at the time of the sale, and, by reason of such unsoundness, was of no value; and that plaintiff, after the sale, but before the bringing of this suit, had expended a reasonable and proper amount of money for necessary care and attention to said slave,—then plaintiff was entitled to recover what would have been the value of said slave, if sound, at the time of the

sale, with interest thereon from the day of sale to the present time; and also the amount so expended for reasonable and proper charges for necessary care and attention to said slave, with interest thereon from the time of payment."

The defendant excepted to that portion of this charge "which allowed plaintiff to recover for money paid for care and attention to said slave," and requested the court to instruct the jury, "that if said slave was of no value at the time of the sale, the measure of damages would be, the value of the slave if she had been sound, with interest thereon up to the present time; and that the plaintiff, in such case, could not recover for any expenses incurred in care and attention to her;" which charge the court refused to give, and the defendant excepted.

The errors assigned embrace all the rulings of the court to which exceptions were reserved.

L. E. Parsons, and Jno. White, for appellant.
James B. Martin, *contra.*

RICE, C. J.—The statements contained in the return of a commissioner appointed to take the deposition of a witness, in relation to the execution of the power conferred by the commission, are to be taken as true, until proof to the contrary is adduced.—Code, § 2323; King v. King, 28 Ala. R. 315, and authorities therein cited. In the absence of evidence to the contrary, the presumption is, that every act shown by the return to have been done by the commissioner, in the execution of the power conferred on him by the commission, was done *according to law.* In such case, the courts must apply the maxim, "*rite esse acta omnia præsumuntur.*"—King v. King, *supra.*

The truth of the statements contained in the return of the commissioner who took the depositions of Connor and Lancaster, is not assailed by evidence; and, as those statements must therefore be regarded as true, we hold that they show that he substantially performed his duty, as directed by section 2322 of the Code, and that the mo-

tions to suppress those depositions were properly overruled.—See the cases cited *infra*.

We are aware that King v. King, *supra*, was a chancery case; and that there is a difference, in some respects, between depositions at law, and depositions in chancery. But, upon the question as to the credit due to the uncontradicted return of a commissioner, and the presumption arising therefrom, the rule laid down in that case is as applicable at law, as it is in chancery,—as is very clearly shown by Ulmer v. Austill, 9 Porter, 157, and other cases at law cited in King v. King; see, also, Sanford v. Spence, 4 Ala. R. 237; Dearman v. Chapman, 5 *ib.* 202; Luckie v. Caruthers, *ib.* 291.

2. The witness Connor was a physician, and had been engaged in the practice of medicine for thirteen years. About the 15th of February, 1854, (not more than two months after the sale,) he was called to see the negro girl, whose soundness is here in controversy. He made a thorough examination of her, and ascertained her condition and disease, which he describes. He says he has a knowledge, "but a limited knowledge of the value of negroes; and gives his "reasons for considering her valueless in her present condition." In the third direct interrogatory propounded to him and other witnesses for the plaintiff, the following questions were embraced: "What is your opinion of the curability of said disease, when taken at the stage at which you found this? Is it easy or difficult of being cured? Does said disease, at the stage at which you found this, have any effect upon the physical strength of its victim? If so, what, and to what extent? What effect did said disease have upon the ability of this negro to perform the labor common to similar negroes who are sound? Did said disease have any effect upon the value of said negro? If so, what? What would she have been worth 31st December, 1853, if she had been sound? What was her value in the condition she was in when you saw her?" The only part of the answers of the witness to these questions, to the introduction of which an exception was taken by the defendant, was the following: "as her medical bill for attention

to her, would exceed the profit she could render her owner." We think the sense of that part of the answer is, to some extent, illustrated by the context; and that it amounts to no more, in substance, than the opinion of the witness, that for the time to come, the value of the services of the negro girl would be less than the value of the medical attention she would require. As the witness had some knowledge of the value of negroes, and was a man of science—a physician—and had made a thorough examination of the negro girl, we think the opinion given by him was admissible, relating as it did to a material matter in the cause. The opinion is the necessary result of two facts—to-wit, the value of her services, and the value of the medical attention she would require; as to each of which the witness had shown himself competent to give his opinion, and more competent to judge than the jurors. True, the jury were to decide upon the value of the opinion, as well as upon the value of the evidence on which it was founded; but the court would be going too far to decide, that the jury could not derive any assistance from that opinion, in forming their conclusion upon the question whether the negro girl was permanently and incurably unsound and wholly worthless.—McCreary v. Turk, 29 Ala. R. 244; Ward v. Reynolds, at the present term; McKee v. Nelson, 4 Cowen, 355; Tullis v. Kidd, 12 Ala. R. 648; 1 Greenleaf on Ev. § 440.

3. Whether there was error in allowing the amendment of the complaint, we need not decide; because, if there was, it was cured by the withdrawal of the amendment, by leave of the court.—See Burch v. Taylor & Co., at the present term.

4. In Hogan v. Thorington, 8 Porter, 428, this court said: "A plaintiff, in general, is entitled to recover for *all losses resulting directly from a breach of the warranty;*" and held, that the purchaser of a slave warranted sound, who has proven entirely valueless, may recover, among other things, "all proper expenditures for medical aid," &c. Upon the authority of that case, we hold, that there was no error in that part of the charge excepted to, and no error in refusing the charge asked.—See Milton v.

Rowland, 11 Ala. Rep. 732; Marshal v. Wood, 16 Ala. R. 806; Cox v. Walker, cited in note to Clare v. Maynard, 6 Ad. & E. 519; Chesterman v. Lamb, 2 Ad. &. E. 129; Addison on Contracts, (edition of 1857,) 273, 1138, 1139, 1147–1149; Lewis v. Peake, 7 Taunton, 153; Pennell v. Woodburn, 7 C. & P. 118.

5. Whether, before the Code, it would have been necessary to have set forth in the complaint such expenditures as special damages, we need not inquire; for, however that may be, it is not under the Code necessary to set them forth in the complaint as special damages, as is evident from the forms laid down in the Code, and from sections 2227, 2228, and 2234 of the Code.

Judgment affirmed.

WALKER, J., not sitting.

LEWIS *vs.* HARRIS.

[ACTION BY PURCHASER FOR BREACH OF COVENANTS CONTAINED IN DEED.]

1. *Breach of covenant at law.*—A purchaser of land, with full covenants of warranty, is entitled to recover, at law, for money paid by him to remove a paramount equitable title existing at the time of the conveyance.
2. *When outstanding equitable title constitutes breach of covenant.*—A purchaser for valuable consideration, without notice of an outstanding equitable title, cannot, on purchasing such equitable title, recover the amount paid from his vendor; whether he could recover, if he had notice of the equitable title at the time of his purchase, but his vendor was an innocent purchaser without notice, *quære?*
3. *Judicial notice of public lands.*—It is a historical fact, of which the courts of this State are bound to take judicial notice, that all the lands in Franklin county are held under the government of the United States.
4. *Variance.*—Under a complaint alleging the purchase by plaintiff of an outstanding equitable title in several persons, for which he seeks to recover damages from his vendor, a recovery cannot be had on proof of the purchase of such title from one of the persons named.
5. *Admission of fact and law.*—The existence of an outstanding equitable title to land in a third person may be proved by a party's parol admission.

APPEAL from the Circuit Court of Madison.
Tried before the Hon. WM. S. MUDD.

THIS action was brought by Benjamin Harris, against John H. Lewis, to recover damages for the breach of covenants contained in a conveyance from said Lewis and wife to Harris, for a tract of land in Franklin county, known as the "Russell's Valley iron-works tract." The conveyance was executed on the 26th August, 1851, and contained the following covenant: "The said Lewis and wife, for themselves, their heirs, executors and administrators, do hereby, and in consideration of the premises, warrant, and will forever defend, the title to the above described and hereby granted premises, unto the said Benjamin Harris, his heirs and assigns, from and against themselves, and all and every person or persons claiming or holding under them, the said John H. Lewis and wife, Mary M. Lewis, and also against the lawful title, claim or demand of all and every person or persons claiming or holding by, from or under the government of the United States." The breaches assigned in the complaint, as amended, were—1st, that defendant has not warranted and defended the premises to plaintiff, but, on the contrary, "plaintiff avers that Peter Lorillard, Thomas A. Ronalds, John Addison Thomas, and John David Wolfe, trustees and executors of the last will and testament of Maria D. L. Ronalds, deceased, lawfully claiming the said premises by an elder and better title, afterwards, to-wit, on the 1st May, 1853, lawfully entered into the said premises, and ousted plaintiff therefrom, and still lawfully hold him out of the same;" 2d, "that at the execution of said deed, the complete legal and equitable title to the said premises was not vested in said defendant, nor in said defendant and his wife, and they did not have power to sell and convey the same to said plaintiff, free from the lawful title, claim or demand of all and every person or persons whomsoever, claiming under them, or under the government of the United States; but, on the contrary, the complete and perfect equitable title to an undivided two-thirds of said premises was vested in Peter

Lorillard, Thomas A. Ronalds, John Addison Thomas and John David Wolfe, trustees and executors of the last will and testament of Maria D. L. Ronalds, deceased, who, after the execution of said deed by said defendant and wife, demanded their said two-thirds interest from said plaintiff, and threatened to file a bill in chancery to recover the same from plaintiff, and only desisted from filing such bill on the payment to them by plaintiff of the sum of $2,000, the value of their said two-thirds interest; and plaintiff avers, that he paid sum of $2,000 to said trustees and executors, to purchase in and remove their said outstanding and paramount equitable title and incumbrance, and to prevent an eviction from the said premises; of all which said defendant had notice."

On the trial, as appears from the bill of exceptions, after reading in evidence his deed from the defendant and wife, "the plaintiff proved that, since the execution of said deed, and before the commencement of this suit, he had paid to one Thomas A. Ronalds the sum of $2,000, for an equitable interest which said Ronalds set up and claimed to have and own in and to an undivided two-thirds of the lands mentioned in said deed; that he paid said sum to avoid the institution of a suit in chancery which said Ronalds had ordered to be instituted, and which was about being instituted by him against plaintiff for a recovery of his alleged interest in said lands; and that the interest which said Ronalds thus set up and claimed, at the time said sum was paid by plaintiff, and at the time of the execution of said deed by defendant and wife to plaintiff, was of the value of $2,000. Plaintiff then offered to prove, by the letters and parol declarations and admissions of defendant, that said Ronalds, before and at the time of the sale of said lands by defendant to plaintiff, and the execution of said deed, had an outstanding equitable title in and to an undivided two-thirds of said lands. To the introduction of such parol declarations the defendant objected; the court overruled the objection, and the defendant excepted.

"There was evidence tending to show, that plaintiff, at the time he purchased said lands from defendant, and re-

ceived a deed to the same from defendant and wife, knew of the alleged equitable title of said Ronalds to said lands. The defendant then proved, and it was admitted by plaintiff, that defendant had the legal title to said lands at the time of the sale and execution of said deed by defendant and wife to plaintiff.

"The court charged the jury, among other things, that if they believed from the evidence that, at the time defendant sold and conveyed to plaintiff the lands mentioned in said deed, there was an outstanding equitable title to an undivided two-thirds of said lands existing in the said Thomas A. Ronalds; and that plaintiff and defendant knew of the existence of said equitable title in said Ronalds, at the time plaintiff purchased said lands, and received said deed from defendant and wife; and that plaintiff, after the purchase of said lands from defendant, and the execution of said deed to plaintiff by defendant and wife, purchased and paid for said equitable title, in order to avoid a suit in chancery which Ronalds had ordered to be instituted against him, and which was then about being instituted against him by Ronalds for the recovery of said equitable interest in said lands,—then they should find a verdict for the plaintiff.

"The defendant excepted to this charge, and asked the court to instruct the jury, that if they believed from the evidence that, at the time defendant sold and conveyed said lands to plaintiff, he had the legal title to the same, they could not inquire into the question of the equitable title, but must find for the defendant; which charge the court refused to give, and the defendant excepted."

The admission of the evidence objected to, the charge given, and the refusal to charge as requested, are now assigned as error.

D. C. Humphreys, and Goldthwaite & Semple, for the appellant.—1. The verbal admission of Lewis, that the equitable title to a portion of the land was in Ronalds, was not competent evidence of that fact, because it was an admission of a matter of law.—Polk's Lessee v. Robertson, 1 Term Rep. 463; Boston Hat Manufacturing Co.

v. Messenger, 2 Pick. 223–40; Leforce v. Robinson, Litt. Sel. Cas. 22; Jackson v. Miller, 6 Cowen, 756; Jackson v. Shearman, 6 Johns. 20. If an admission, by a party having the legal title to land, that an equitable title existed in another, be competent evidence, it would necessarily be conclusive, since it would be impossible, in most cases, to disprove the existence of such equitable title.

2. This evidence was, moreover, irrelevant to the issues. The breaches assigned in the complaint averred an outstanding equitable title in Ronalds and several others, while the evidence tended to show such title in Ronalds alone. The variance rendered the evidence inadmissible, even if it was otherwise competent.

3. The charge of the court was wrong. An outstanding equitable title in Ronalds, at the time of the sale and conveyance by defendant to plaintiff, was not a breach of the covenants contained in the deed; the legal title being in the grantor. The existence of an outstanding legal title, at the execution of a deed with warranty of title, is a breach of the covenants, because, as between two legal titles, the prior must prevail. But a court of law cannot investigate or give effect to an equitable title, at least until there has been a judicial ascertainment of that equity.—Robinson v. Campbell, 3 Wheaton, 212; Lake v. Hastings, 24 Miss. 490. A prior equitable title does not always prevail over the legal title: it should have been shown that Ronalds had such an equitable title as was entitled to postpone the legal title. The covenants of the deed resulted from the use of the statutory words "grant, bargain and sell," and the express warranty of title against the grantors and all claiming under the United States. The implied covenants extend only to acts done or suffered by the grantor or his heirs.—Roebuck v. Dupuy, 2 Ala. 535; Griffin v. Reynolds, 17 Ala. 198. It was not shown that the equitable title of Ronalds was derived from or under the grantor or his heirs, or that it was derived from any one who held under the United States; and yet the charge made it amount to a breach of the covenant, notwithstanding this deficiency of the proof. In addition to these objections to the charge, it was

undoubtedly erroneous in allowing a recovery on proof which was variant from the case made by the complaint.

ROBINSON & JONES, *contra.*—1. The deed contained the statutory covenants, and an express covenant of warranty of title against all persons holding or claiming under the grantors, and against any other "lawful title, claim or demand" under the United States. The implied covenants are, "that the grantor was seized of an indefeasible estate is fee-simple, freed from incumbrances done or suffered by the grantor; and also for quiet enjoyment against the grantor, his heirs and assigns."—Clay's Digest, 156, § 31; Roebuck v. Dupuy, 2 Ala. 535; Andrews & Bro. v. McCoy, 8 Ala. 928. Since there can be no lawful title, claim, or demand to lands in Franklin county, not derived from the United States, the express warranty extends to any lawful title, claim or demand whatever, which is equivalent to a covenant for quiet enjoyment. Caldwell v. Kirkpatrick, 6 Ala. 60; Andrews & Bro. v. McCoy, 8 Ala. 928. The effect of the defendant's covenants, then, is, that he was seized of an indefeasible estate in fee-simple, freed from incumbrances done or suffered from him or those claiming under him, which should be quietly enjoyed by plaintiff, as against not only the grantor himself and those claiming under him, but against the whole world.

2. It is settled in this State, that a purchaser, with warranty of title, may buy in an outstanding paramount title or incumbrance, and recover its value from his vendor, without an actual eviction.—Dupuy v. Roebuck, 7 Ala. 484; Davenport v. Bartlett & Waring, 9 Ala. 180; Anderson v. Knox, 20 Ala. 156. No case has been found, which recognizes a distinction, in this respect, between legal and equitable incumbrances; but, on the contrary, there are many cases in which courts of law have thus recognized equitable titles.—See Elliott v. Edwards, 3 Bos. & P. 181; Maberly v. Robins, 5 Taunton, 625; Dart on Vendors and Purchasers, 456; Jones v. Robinson, 10 Johns. 269; Sprague v. Baker, 17 Mass. 585; Prescott v. Trueman, 4 Mass. 628; 1 Bouvier's Law Dictionary,

491. The reason of the rule extends to equitable, as well as legal incumbrances; and there is no principle of law which warrants the distinction attempted to be drawn. The action at law is not based on the equity, nor is the court asked to enforce the equitable right: the suit is for the breach of covenant, and the equity is only incidentally and collaterally involved. There are many analogous cases, in which courts of equity, while refusing to enforce legal rights, entertain jurisdiction of equitable matters involving purely legal questions; and courts of law, on the other hand, recognize purely equitable rights incidentally involved in legal questions. Moreover, if plaintiff cannot enforce his rights in this action, he is without redress. Hatch v. Cobb, 4 Johns. Ch. 559; Kempshall v. Stone, 5 Johns. Ch. 193; Cullum v. Branch Bank, 4 Ala. 29; Thompson v. Christian, 28 Ala. 406.

3. As both parties knew of the existence of this equitable title, at the time of the plaintiff's purchase, it could not have been defeated on the plea of a *bona-fide* purchase for valuable consideration without notice.

4. The question of variance was not raised in the court below. The evidence was suffered to go to the jury without objection, and no charge was asked on the effect of the alleged variance. The objection is not reached by a general exception to the charge, but the error, if any, is waived.—Blount v. McNeill, 29 Ala. 473; Merritt v. Seaman, 6 Barbour, 335; Underhill v. Pomeroy, 2 Hill's (N. Y.) R. 603. The charge given asserts a correct legal proposition, and no qualification to it was asked.—Miller v. Jones, 29 Ala. 180; Lockwood v. Nelson, 16 Ala. 294; Waters v. Spencer, 22 Ala. 466; Kirkland v. Oates, 25 Ala. 468; Hutchinson v. Dearing, 20 Ala. 804; Ewing v. Sanford, 19 Ala. 613; Ivey's Adm'r v. Owens and Wife, 28 Ala. 648. To allow this objection now to be raised to the charge, would, in effect, make the judge responsible for the admission of evidence to which the parties raised no objection, and allow a party to take advantage of an error at which he connived.

5. There was no error in admitting proof of the defendant's parol admissions as to the existence of the equitable

title in Ronalds. The admission was as to a mixed question of law and fact, and, consequently, competent evidence for the jury.—1 Greenl. Ev. § 97, and cases cited. If the suit had been in chancery, the evidence certainly would have been competent; and the rules of evidence are the same at law as in equity.—Dwight v. Pomeroy, 17 Mass. 303; 2 Story's Equity, § 1527. The objection of variance cannot now be raised to this evidence, under the general objection made in the court below.—Phillips v. Kelly, 29 Ala. 632; Cunningham v. Cochran & Estill, 18 Ala. 480; Donnell v. Jones, 13 Ala. 490; 1 Zabr. 566; 3 How. U. S. R. 515; 6 Barbour, 335; 2 Hill, 603.

WALKER, J.—The charge of the court below authorized a recovery, in an action for a breach of warranty, of damages for money paid to remove a paramount equitable title existing at the time of the conveyance. The appellant contends, that a vendor, who has the legal title, cannot be made liable at law for a breach of warranty, growing out of the necessary purchase by the vendee of an outstanding adverse equitable title. That the existence of such an equitable title, and the compulsory purchase of it, amount to a breach of covenant of quiet enjoyment, is not denied; but the point made is, that a court of law cannot take cognizance of the equitable outstanding title.

While we concede that an equitable title cannot be enforced in a court of law, we think that it may be the ground from which the legal right springs, and that, in the enforcement of the legal right, it may become necessary and competent for the court of law to recognize the equitable title. The contrary of this doctrine was held, in 1800, by Lord Kenyon, who said, "Sitting in a court of law, we cannot take notice of an equitable title."—Alpass v. Watkins, 8 Term R. 516. In that case, a recovery back of a part of the purchase-money, paid by the plaintiff on a contract for the purchase of land, was refused, upon the ground that, for the purpose of a trial at law, the vendors had a good legal title. The same question came up two or three years later; and Lord Alvanley decided, that a plaintiff, who had paid a deposit on the purchase of a

leasehold estate, might recover it back in an action for money had and received, upon the ground that the title was not good in equity.—Elliott v. Edwards, 3 B. & P. 181.

The same question again occurred in 1814, in the Engglish court of common pleas; and Gibbs, Chief-Justice, having before him the decisions in Alpass v. Watkins, and Elliott v. Edwards, decided that the deposit made by a purchaser might be recovered back at law, because the title was defective in equity. He uses the following language: "Here is a contract to make out a good title. If that contract be a contract to make a good title both in law and equity, we must collaterally look to see whether the title be good in equity, as well as in law. It is true we sit here only as a court of law, to administer the legal rights which arise out of the contract; but one of those rights is, to have a title good in equity. See to what a length the defendant's doctrine would proceed! If a deed appeared on the abstract, whereby lands were conveyed to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs, it would prove that a good title at law was made out in B. and his heirs, to convey without the concurrence of C." This decision, it is said in 1 Sugden on Vendors, 243, "appeared to have set the point at rest." In the later case of Bayman v. Gutch, 7 Bing. 379, the question does not seem to have been, whether a court of law could take cognizance of the fact that a title was bad in equity; yet the court, without controverting the cases above cited, make some remarks which do not harmonize with the law as laid down in them. The question in Willet v. Clark, 10 Price, 207, was altogether different; and that case is not at war with the proposition which we have laid down. The question in that case was, whether the purchaser could defend against a suit for the purchase-money, because the title of the vendor was derived by a purchase at a bankrupt sale by the assignee, and was, therefore, liable to be avoided in equity. The principle laid down in the decisions of Lord Alvanley and C. J. Gibbs, is asserted in Addison on Contracts, 177, and the authority of those decisions is there recognized.

This principle is also supported by decisions on analogous questions. Thus, it is held, that a promise in consideration of the release of an equity of redemption, after condition broken, will sustain an action at law, and that the court of law "will take notice that the mortgagor has an equity to be released in chancery."—Thorpe v. Thorpe, 1 Lord Raymond, 662. An agreement to forbear proceedings to enforce a well founded claim in equity, may be recovered upon at law.—Dowdenay v. Oland, Cro. Eliz. 768; 1 Parsons on Contracts, 365; Robinson's Adm'rs v. Tipton's Adm'r, at the present term. An action at law may be maintained upon a promise in consideration of the waiver of an equitable right.—1 Parsons on Contracts, 369; Whitbeck v. Whitbeck, 9 Cow. 266. A purchaser of land by parol, who has gone into and retains possession, (his vendor not having failed or refused to comply with the contract,) cannot resist a recovery on his note for the purchase-money, upon the ground of a want of consideration.—Gillespie v. Battle, 15 Ala. 276.

The breach of the covenant gives a right at law to recover damages; and if that breach has grown out of the existence of an equitable title, it is, in our judgment, competent for a court of law to take notice of the equitable title, so far as it constitutes an element of the breach of warranty. It results that the charge is not erroneous, because the outstanding title bought in by the covenantee was equitable.

2. It is also objected to the charge given by the court below, that it permitted a verdict for the plaintiff without regard to the question, whether the equitable title was paramount or superior to the legal title conveyed to him. The charge was, that if an equitable title existed at the time of the conveyance in one Ronalds, and the plaintiff and defendant knew of it; and if the plaintiff had since bought in that equitable title, for the purpose of avoiding a chancery suit to enforce it, the plaintiff was entitled to recover. An equitable title might have existed at the time of the conveyance, which was paramount to the legal title conveyed to the plaintiff, but which would nevertheless have been postponed to the title de-

rived by the conveyance. That could have been the case, where the plaintiff was a purchaser without notice. But the charge does not authorize a recovery in the case where the plaintiff has bought in an equitable title, subordinate to his legal title, because he was a purchaser without notice. On the contrary, it makes the knowledge of the plaintiff and defendant, of the outstanding equitable title, one of the requisites to a recovery. It might be that both the plaintiff and defendant, at the time of the conveyance by the latter to the former, had knowledge of what is called the equitable title; and yet it might be postponed to the legal title, because the person under whom the defendant held was an innocent purchaser, for valuable consideration, without notice of the equity. Whether the charge is obnoxious to the objection, that it would allow a recovery in such a case, we do not think it necessary for us to decide. The judgment must be reversed on another point; and it will be very easy for the court, in any future charge, to avoid the point of difficulty and doubt in the present charge.

3. It is a historical fact, that the lands in Franklin county, in this State, are all held under the government of the United States. The evidence of that fact is found in the treaties with the tribe of Indians who transferred the lands to the United States, and in the acts of congress. Even the reservations, provided for by the treaty, were held under the United States. The title to them came from the United States. So the school lands were transferred by the general government in trust to the State, and are thus held under the United States. The warranty of title in the deed "against the lawful title, claim or demand of all and every person, claiming or holding by, from or under the government of the United States," is, in effect, a covenant of warranty against the title of all persons; and it was not incumbent upon the plaintiff to show that the equitable title bought in by him was the title of one "claiming or holding by, from or under the government of the United States." That is a fact of which the court was bound to take judicial notice. The general warranty of title was equivalent to a coven-

ant for quiet enjoyment.—Caldwell v. Kirkpatrick, 6 Ala. 60; Andrews v. McCoy, 8 Ala. 929. This covenant of quiet enjoyment was broken, if the plaintiff was compelled to buy in the equitable title which was outstanding at the time the covenant was made, and paramount to the legal title, in order to avoid a suit for its enforcement. Anderson v. Knox, 20 Ala. Rep. 156; Davenport v. Bartlett & Waring, 9 Ala. Rep. 180; Dupuy v. Roebuck, 7 Ala. Rep. 484.

4. The breaches assigned allege, that the plaintiff has bought in an equitable title of Peter Lorillard, Thomas A. Ronalds, John A. Thomas, and John D. Wolfe, trustees and executors of the last will and testament of Mariah D. L. Ronalds, deceased. The proof showed an outstanding equitable title in Thomas A. Ronalds, and the charge authorized a recovery upon that proof. The charge, in this respect, is clearly erroneous. The plaintiff has no right to recover upon a cause of action totally different from that described in his complaint. It is not sufficient that the plaintiff makes out a right of action by evidence. He must prove the cause of action averred in the complaint. The omission to object to irrelevant evidence when it is offered does not preclude the right to move its exclusion, or to ask a charge at any time before the jury retire, nor authorize a charge that the plaintiff may recover upon facts variant from those alleged.

5. The evidence which was objected to was only illegal because it tended to make a case different from that alleged. The admissions were of matters of law, so mingled with matters of fact, that they could not be separated. If relevant, they were admissible.—1 Greenleaf on Evidence, § 97.

The judgment of the court below is reversed, and the cause remanded.

PRICE *vs.* MAZANGE & CO.

[GARNISHMENT ON JUDGMENT—CONTEST OF GARNISHEE'S ANSWER.]

1. *Competency of defendant as witness for garnishee.*—When the answer of a garnishee is contested by the plaintiff, and the validity of a mortgage executed by the defendant to the garnishee is controverted, the defendant is a competent witness for the garnishee, although the statute (Code, § 2292) declares him incompetent to testify for the mortgagee on the trial of a claim suit.
2. *General notoriety admissible to prove knowledge of fact.*—Where the validity of a mortgage is impeached for fraud, the fact that the mortgagor, at the time of its execution, "was notoriously insolvent," is admissible evidence, as tending to prove that such insolvency was known to the mortgagee. (Overruling *Stanley & Elliott v. The State*, 26 Ala. 26.)
3. *Admissibility of garnishee's answer as evidence.*—The answer of a garnishee, when controverted by the plaintiff, may be given in evidence by the plaintiff, but not by the garnishee himself.
4. *Party cannot impeach evidence adduced by himself.*—When the answer of a garnishee is adduced in evidence by the contesting plaintiff, he cannot discredit it in a request for instructions to the jury; nor can the court, *ex mero motu*, as in favor of the plaintiff, give any charge to the jury which tends to discredit the answer.
5. *Evidence of property in foreign jurisdiction not admissible on issue contesting validity of mortgage.*—On the trial of an issue respecting the validity of a mortgage, between a judgment creditor of the mortgagor and the mortgagee as garnishee, the fact that the mortgagor, at the time of the execution of the mortgage, owned lands in Texas, is not admissible evidence for the garnishee.
6. *Charge referring legal question to jury.*—A charge which refers to the jury the construction of any provision in a mortgage, the validity of which is controverted before them, is erroneous.
7. *General assignments by insolvent debtors.*—Section 1556 of the Code, respecting general assignments by insolvent debtors, does not render void a general assignment which provides for a preference among creditors, but only declares that such assignment shall enure to the benefit of all the grantor's creditors equally; consequently, where the validity of a mortgage is impeached for fraud, this statute can have no application.
8. *Validity of mortgage.*—A mortgage, executed by a debtor who is insolvent or in failing circumstances, to one of his creditors who has knowledge of his pecuniary condition, and whose debt is not due or bearing interest; conveying the debtor's entire stock of goods, together "with such other goods and chattels as the said B. [mortgagor] may from time to time hereafter purchase and place in said store, to keep up and renew his stock in trade;" fixing no law-day, but authorizing the mortgagee to sell, at public or private sale, on default being made in the payment of any of the notes and interest,—is fraudulent and void as against the existing creditors of the mortgagor.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. MCKINSTRY.

THE appellees in this case, having obtained two judgments against Charles H. Bostwick, at the November term, 1854, of said city court, amounting together to nearly $600, caused a garnishment to be thereon issued and served on Caleb Price, as the debtor of said Bostwick. The garnishee appeared, in answer to the summons, filed a written answer, and afterwards answered orally in open court. The substance of these answers was, that Bostwick, on the 20th July, 1854, being indebted to him in the sum of $6,407 96, by several promissory notes falling due at different times between that day and the 10th March, 1855, executed to him a mortgage on his entire stock of goods, to secure the payment of said notes; that the garnishee took possession of the stock of goods, on the 2d November, 1854, under the powers conferred on him by the mortgage, and proceeded to sell them at private sale; and that the amount realized from the sale of the goods, up to the time the answer was made, was not enough to pay the secured debts. The answer was contested by the plaintiffs; and on the trial of the issue formed on it, the garnishee reserved several exceptions to the rulings of the court, which present all the matters now assigned as error.

The mortgage from Bostwick to Price conveyed "all and singular the goods, wares and merchandise hereinafter particularly mentioned and expressed in the schedule hereunto annexed, marked 'A,' now being in the warehouses and store on the north side of Government street, and west of St. Emanuel street, in the city of Mobile; together with such other goods and chattels as the said Bostwick may, from time to time hereafter, purchase and place in the said store and warehouses, to keep up and renew his stock in trade; which goods, &c., so to be hereafter purchased, shall be subject to the same lien and disposition as those named in said schedule." The secured debts are described as being due "according to fifteen promissory notes, due and payable at the Bank of Mobile,

as follows: one for $132 41, due 6–9th August, 1854; one for $100, due 15–18th August, 1854; one for $129 96, due 16–19th August, 1854; one for $129 96, due 25–28th August, 1854; one for $129 96, due 3–6th September, 1854; one for $178 64, due 10–13th September, 1854; one for $132 41, due 13–16th September, 1854; one for $132 41, due 23–26th September, 1854; one for $542 44, due 3–6th October, 1854; one for $600, due 9–12th October, 1854; one for $711 13, due 10–13th November, 1854; one for $675, due 10–13th December, 1854; one for $937 88, due 10–13th January, 1855; one for $937 88, due 10–13th March, 1855." The condition of the mortgage was as follows: "That if the said party of the first part pay to the said party of the second part the just and full sum of $6,407 96, with lawful interest until paid, according to fifteen promissory notes," (describing them as above,) "then these presents and said promissory notes shall cease, determine, and be void; but, in case of the non-payment of the sum of $6,407 96, or any part thereof, or the interest on any part thereof, so to become due at the time above limited for the payment thereof, then, in every such case, it shall and may be lawful for the said party of the second part, his heirs, executors, administrators and assigns, to grant, bargain and sell the said goods, wares and merchandise, at public auction or private sale, and, on such sale, rendering the overplus moneys, if any there be, to the said party of the first part, his heirs, executors, and administrators, after deducting the costs and charges of such public or private sale as aforesaid."

During the progress of the trial, "the garnishee proposed to introduce as a witness Charles H. Bostwick, the defendant in the judgment. The plaintiff objected to his competency, on the ground that he was the mortgagor and the defendant in execution. The court sustained the objection, and excluded the witness; to which the garnishee excepted. The defendant then proposed to prove by said Bostwick that, at the time said mortgage was made, he had other property than that embraced in it; but the court refused to let him testify, and the garnishee excepted."

The plaintiff introduced as a witness one M. F. Roulston, a deputy sheriff, and asked him, "if said Bostwick, on the 20th July, 1854, was not reputed notoriously insolvent." On the defendant's objection that insolvency could not be shown in that way, the court would not let the question be asked. "The evidence was then offered to show knowledge by Price of Bostwick's insolvency, and the court admitted it for that purpose only; ruling, that it might be received as tending to show that Price had knowledge of such insolvency." To this ruling of the court the garnishee excepted.

The garnishee offered to prove by a witness, "that said Bostwick, on the 20th July, 1854, owned landed property in Texas." The court rejected the evidence, and the garnishee excepted.

"The court charged the jury, among other matters,—

"1. That it was not necessary that he should have conveyed all his property, if the conveyance was of all his available property.

"2. That in reference to the answer of the garnishee, if they believed that, when speaking of matters which he knew of, he stated them inconsistently, and with the apparent object of concealing what he should have answered, that would authorize them to lean against him on that point.

"3. That to show the insolvency of Bostwick, it was necessary to show that he was actually insolvent; but it would be sufficient to show that he was in failing circumstances, and that Price knew of it."

"To these charges the defendant excepted, and then requested the court to instruct the jury as follows:

"1. That the answer of the garnishee was not evidence for any purpose whatever.

"2. That if they believed from the evidence that Bostwick, at the time of the execution of said mortgage, was honestly indebted to Price in the sum therein mentioned; and that said mortgage was executed, in good faith, to secure said sum of money; and that said Price, after default made, took possession of the stock of goods, and sold the same to the best advantage, and, after deducting

expenses of said sale, retained the said sum of money, which was not more than sufficient to pay the sum mentioned in the mortgage,—then they should find for the defendant.

"3. That if they believed from the evidence that Bostwick, at the time the mortgage was made and executed, was honestly indebted to garnishee in the sum therein mentioned; and that said mortgage was made, in good faith, to secure said sum of money; and that said Price, after default made, took possession of the stock of goods, and sold the same to the best advantage, and, after deducting expenses of said sale, retained the said sum of money, which was not more than sufficient to pay said mortgage debt; and that said Bostwick had other property than that embraced in said mortgage,—then they should find for the defendant.

"4. That if they believed from the evidence that Bostwick, at the time said mortgage was executed, was honestly indebted to the garnishee in the sum mentioned in the mortgage; and that said mortgage was made, in good faith, to secure said sum of money; and that said Price, after default made, took possession of said stock of goods, and sold the same to the best advantage, and, after deducting expenses of said sale, retained the said sum of money, which was not more than sufficient to pay said mortgage debt; and that said garnishee did not know that Bostwick was otherwise indebted at the date of the mortgage,—then they should find for the defendant."

The court refused the first one of these charges, and gave the others, but with this qualification: "That if the jury believed from the evidence that, when Bostwick made said mortgage, it was to secure debts then past due and renewed; and that he was then owing other persons, and was insolvent, and conveyed all of his property to Price for the payment of his debt, leaving all of his other debts unprovided for; and the mortgage provided that Bostwick should remain in possession of the property until Price took possession of it, on the failure of the first note, if he thought fit to do so; and that Bostwick remained in possession, selling and disposing of the

property for himself, until the 2d November, 1854; and the mortgage provided that the surplus, after paying Price's debt and the expenses, should be refunded to Bostwick; and that these facts were known to Price,—then the conveyance was fraudulent and void as against the creditors of Bostwick not provided for, without reference to the intention of the parties."

The garnishee excepted to the refusal of the first charge asked by him, and to the qualification added to the other charges asked; and he now assigns as error the several rulings of the court, as above stated, to which he reserved exceptions.

WM. BOYLES, and D. CHANDLER, for the appellant.

A. J. REQUIER, *contra.*

STONE, J.—In Prentice v. McClanahan & Johnson, at June term, 1856, we considered and construed section 2291 of the Code. That was a case where a garnishee had answered to an indebtedness, but further answered that he had received notice that the note which evidenced his indebtedness had been transferred. An issue was made up under the statute, contesting the right to the note and its proceeds; and on the trial, the transferrees offered the defendant in execution as a witness. We held, that he was competent; overruling Scott, Slough & Co. v. Stallworth, 12 Ala. 25, and Marston v. Carr, 16 Ala. 325. In fact, we consider that the former of those cases had been overruled by Myatt v. Lockhart, 13 Ala. 338; and the latter by Kirksey v. Dubose, 19 Ala. 44, and Zackowski v. Jones, 20 Ala. 189. Our own decisions were in irreconcilable confusion. Both the reasoning and the results attained in the cases last cited have our unqualified approbation, and we adhere to the conclusions we announced in the case of Prentice v. McClanahan, *supra.* It results, that the court erred in refusing to permit Bostwick to testify at the instance of appellant.

2. As testimony tending to show that Price, at the time he took the mortgage from Bostwick, *knew* that the latter was insolvent, the plaintiff in garnishment proved,

against the objection of the defendant, that Bostwick was, at the time he executed the mortgage, *notoriously insolvent.* To this ruling of the court an exception was taken; and the case of Elliott & Stanley v. The State, 26 Ala. 26, is here relied on, as showing that in this particular the city court erred.

Although this question is one simply of evidence, yet it is of great practical importance. In most of our jury trials, involving the *bona fides* of assignments, mortgages and conveyances, this question of notice becomes a material inquiry. It is rarely susceptible of direct or positive proof. The more complete and manifest the insolvency, the less likely will the public be to remark or comment upon it. The universality of the knowledge precludes probability that the subject will be discussed, and thus heightens the difficulty of proving the direct fact of notice.

Another argument: The credit system rests, not alone, or even mainly, on the personal confidence which one man reposes in another. Ability to pay—responsibility to the coercive power of an execution—is a weighty consideration with one who parts with his goods on credit. Persons engaged in commerce and traffic are usually prudent, if not cautious. It is difficult to believe that merchants and traders will not learn the pecuniary condition of their customers, when that condition so vitally affects them, and is notorious in the neighborhood in which they are operating.

We think the vice of the argument in the case above cited, so far as it assails our former decisions on this point, consists in this, that it treats the subject as if the evidence when adduced *must control* the jury. Such was not the rule as formerly declared. It was only evidence to be weighed by the jury, as other circumstantial evidence is weighed. Its effect was for them, and, of course, would be greater or less, as the nature of the business in which the grantee was engaged, and the degree of notoriety which the grantor's insolvency had acquired, would strengthen or weaken the probability that the grantee also knew of its existence.

Without intending in this opinion to extend this principle further than to provide for cases like the present, we re-affirm the doctrine settled in the cases of Ward v. Herndon, 5 Porter, 382; Lawson v. Orear, 7 Ala. 784; Bank v Parker, 5 Ala. 731; Cook v. Parham, 24 Ala. 21, re-affirming Bank v. Parker, *supra*.

Lest this opinion might mislead, we feel it our duty to state, that the evidence we have been considering was not offered as a means of proving the *fact* of insolvency. For that purpose it would have been inadmissible.—See citations *supra*, and Brice & Co. v. Lide, at the present term. The testimony was offered simply as one means of proving *knowledge* in the grantee, of a fact the existence of which, under the rule, must have been established by other proof.

3. The record in this case does not contain enough to inform us whether the court erred in refusing to give the charge, that the answer of the garnishee was not evidence. Under the rule which requires us to indulge every reasonable presumption in favor of the correctness of the ruling in the primary court, it is our duty to suppose the answer was in evidence. The answer of the garnishee, although a part of the record in the cause, is, we admit, not necessarily evidence before the jury, in a contest such as this. It may, however, be given in evidence by the plaintiff in garnishment, but cannot be by the garnishee. See Myatt v. Lockhart, 9 Ala. 91.

4. This clear proposition, that the answer of the garnishee is not, *per se*, evidence in the cause, and can only be made evidence by the plaintiff, bears directly on the second charge given by the court. That charge relates exclusively to this answer. The answer, if in evidence at all, being made evidence by the act of the plaintiff, it was not permissible for him to discredit that evidence. Any charge, given at his instance, or by the court *ex mero motu*, which tended to throw distrust over that evidence, or instructed the jury that they might, for the benefit of plaintiff, lean against that evidence, violated one of the fundamental rules of evidence.

5. We do not think the court erred, in refusing to

receive evidence that the defendant in execution owned lands in the State of Texas. Such lands, if owned by him, were without the jurisdiction of the court, and could not be reached by any process known to our laws.—See Richards v. Hazzard, 1 Stewart & Porter, 156; Snedicor v. Burnett, 9 Ala. 434; Wilson v. Matthews, Finley & Co., at this term.

6. The explanatory charge given in this case is objectionable, in this, that it refers the question of the construction of one feature of the mortgage to the jury. Its language is, "If the jury believed from the evidence that * * * * the mortgage provided that Bostwick should remain in the possession of the property until Price took possession of it on the failure of the first note, if he thought fit to do so," &c. The construction of each and every clause of the mortgage was a question for the court, and should not have been left to the jury. There is another clause of this charge subject to the same criticism.

7. Another question was probably mooted in the trial below. The bill of exceptions is not very clear on this point; but we infer that section 1556 of the Code was made to bear on this case. If so, that was error. The effect of that section is not to render deeds which come within its provisions *void*. It simply defeats all preference of creditors which may be attempted in a general assignment. It does not destroy the deed, but upholds it in all respects, save that it destroys the preference. That section can exert no influence, in a trial which attacks such deed for fraud.—See Holt & Chambers v. Bancroft, Betts & Marshall, 30 Ala. 193.

8. We will not apply these principles to the various rulings of the primary court. We feel it our duty, however, to determine the character of this mortgage, presented as that question is by the refusal of the city court to give several of the charges asked by the garnishee. The mortgage in this case, after conveying the stock of goods owned by Bostwick, conveys also "such other goods and chattels as the said Bostwick may, from time to time hereafter, purchase and place in the said store and

ware-houses, to keep up and renew his stock in trade, which goods, &c., so to be hereafter purchased, shall be subject to the same lien and disposition as those named in said schedule marked A." The mortgage fixes no law day in express terms, but rather contemplates delay, in this, that although the notes were none of them due or bearing interest, yet it provides for the payment of the notes and all interest on them. It also gives authority to sell at public auction or private sale. Reading this mortgage, it is impossible to resist the conclusion, that the parties intended that the business should, for a time at least, continue as it had been previously conducted. It is, in its main features, strikingly like the mortgage we construed in the case of Constantine v. Twelves, 29 Ala. 607. In that case we said, "It is a sound principle, that when a debtor engaged in the mercantile business, in contemplation of insolvency, executes a deed as a security to a creditor, conveying his entire stock of goods, but reserves the possession of the goods and the right to continue to carry on the business as he had carried it on before, and to sell the goods in an undefined way, accounting only for the proceeds of such sales; and the creditor is aware of the contemplated insolvency, this reservation creates the presumption of fraud, which, if not rebutted by other facts and circumstances, is sufficient in law to render the deed fraudulent and void as to the other creditors of the grantor."—See, also, Ticknor, v. Wiswall, 9 Ala. 305. This mortgage has not even the dubious merit of providing that the proceeds of sales to be made by Bostwick shall be paid over to the mortgagee. Whether the mortgagor was insolvent, or in failing circumstances, when he executed this mortgage; and if so, whether Price knew that fact, were among the controverted questions in the court below. It is not for us to decide them. If the jury find their existence, we think the result follows, that this mortgage was fraudulent as to the existing creditors of Bostwick.

The judgment of the city court is reversed, and the cause remanded.

MOBILE MARINE DOCK AND MUTUAL INS. CO. *vs.* McMILLAN & SON.

[ACTION ON AGREEMENT FOR INSURANCE, AND MARINE POLICY OF INSURANCE.]

1. *Validity of parol agreement of insurance.*—Neither the common law, nor any statutory provision of force in this State, requires that an agreement to insure against loss on goods by fire, between two specified points, should be reduced to writing.
2. *Validity of divisible contract partly invalid.*—A verbal agreement to insure goods, not only against loss by fire, but against other risks or perils which are within the statute of frauds, is valid as to the former provision, although it may be void as to the latter.
3. *Action lies on parol agreement to insure.*—A party having an insurable interest in goods, and having made a verbal agreement with another for insurance on them against loss by fire, may, after a loss has occurred, maintain an action at law on the agreement.
4. *Sufficiency of complaint.*—In declaring on a parol agreement to insure goods against loss by fire and other perils, it is not necessary to state in the complaint all the specified perils, when the single peril by which a loss was caused is sufficiently set forth.
5. *Admissibility of parol evidence in aid of written memorandum.*—Where a written memorandum, which does not amount to a contract, is drawn up after the conclusion of a valid parol contract, parol evidence is admissible in aid of it; and the oral evidence and memorandum may be concurrently admitted to prove the terms of the contract.
6. *Opinion of witness as to meaning of term in contract.*—Except in matters of science and skill, and some other special cases resting on peculiar circumstances, a witness cannot be allowed to testify to the meaning of a word or term used in a contract.
7. *Admissibility of evidence to show intention of parties to contract.*—Where the terms of a parol agreement to insure goods are in issue as to the point at which the risk was to terminate, the agent of the insurance company, by whom the contract with the assured was made, cannot be allowed to testify that, if the question had been asked at the time the contract was made, he would have charged a higher premium to cover risk on the goods to the point for which the assured contends.
8. *Relevancy of evidence affecting contract of insurance.*—In an action on a parol agreement to insure cotton shipped from Mobile to New Orleans, the terms of the contract being in issue, the plaintiff may adduce evidence of the business in which he was engaged; but the fact that the consignees had a general policy which would cover the cotton from the time of its reaching New Orleans, is irrelevant and inadmissible.
9. *Construction of contract of insurance as to commencement and termination of risk.* Under a contract for insurance on cotton from Mobile to New Orleans by a specified steamboat, the risk commences when the goods are put on board

of the boat, and continues until they reach the usual place in New Orleans for the delivery of goods in that course of trade; unless it is shown that, according to the custom and usage of underwriters and persons engaged in the insurance business at the place where the contract was made, the word "New Orleans," as used in such contract, meant, and was intended to mean, the usual place of unloading the boat in the course of that trade.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by the appellees, to recover damages for the loss of 134 bales of cotton, part of 198 bales, shipped by them from Mobile to New Orleans per steamboat Helen, consigned to Rugely, Blair & Co., and destroyed by fire while on the wharf at the lake end of the Jefferson and Pontchartrain railroad about eight miles from the city of New Orleans. It is the same case which is reported in 27 Ala. 77.

The complaint was as follows:

"The plaintiffs claim of the defendant, a corporation doing business in Mobile, the sum of $6,700, the agreed value of 134 bales of cotton, a portion of 198 bales, which said defendant, on the 26th January, 1854, agreed to insure against loss by fire, among other perils, from Mobile to New Orleans, at the agreed value of $9,900, and for the consideration of three-sixteenths of one per cent., which was paid by plaintiffs to defendant; which 134 bales of cotton were wholly lost and destroyed by fire before they reached New Orleans, and on their transit from Mobile to New Orleans; of which defendant has had notice.

"The plaintiffs claim, also, the further sum of $6,700, the value of 134 bales of cotton, which the defendant, on the 26th January, 1854, agreed and undertook, for the consideration of three-sixteenths of one per cent., which the plaintiffs paid to the defendant, to insure against loss and injury by fire, among other perils, from Mobile to New Orleans. The plaintiffs allege, that the defendant, on said 26th January, 1854, agreed and undertook to insure against fire, among other perils, 198 bales of cotton, at the agreed value of $9,900; that said cotton was ship-

ped on board the steamboat *Helen*, a good and sufficient boat, to be transported from Mobile to the terminus of the Carrollton and Jefferson railroad at Lake Pontchartrain, and thence by said railroad to New Orleans,—such being the usual and ordinary mode and route of shipment and transportation from Mobile to the city of New Orleans; that the steamer *Helen* safely arrived at the wharf at Lake Pontchartrain, and had thrown off upon the wharf 134 bales of cotton, so agreed and undertaken to be insured, when the steamer *Georgia*, arriving at said wharf, took fire, which fire consumed said 134 bales of cotton so thrown off on the wharf; so that the said plaintiffs in fact say, that said 134 bales of cotton, so agreed and undertaken by the defendant to be insured, of the value of $6,700 as aforesaid, was destroyed by fire before it reached New Orleans, and while on transit in the usual and customary route for the conveyance of goods from Mobile to New Orleans, to-wit, on the 28th January, 1854; of which the defendant has had notice.

"The plaintiffs also claim of the defendant $6,700, the value of 134 bales of cotton, which said defendant, on the 26th January, 1854, insured against fire, among other perils, from Mobile to New Orleans; which said 134 [bales of cotton] were sent forward in the usual and customary mode of shipment and conveyance from Mobile to New Orleans; which said cotton was wholly consumed by fire before it reached New Orleans; of which said defendant has had notice.

"The plaintiffs claim of the defendant, also, the further sum of $6,700, the value of 134 bales of cotton, a portion of 198 bales, which said defendant, for the consideration of three-sixteenths of one per cent., paid by plaintiffs to defendant, agreed, on the 26th January, 1854, that he would insure against fire, among other perils, at the agreed value of $9,900, from Mobile to New Orleans; which said cotton being sent forward in the usual mode of conveyance and transportation from Mobile to New Orleans, the said 134 bales, a portion thereof, were consumed by fire upon their transit from Mobile to New Orleans, and before they reached New Orleans; and said defendant,

being requested, refused, and still refuses, to issue said policy of insurance, in accordance with said agreement; whereby said defendant, under and by virtue of said agreement, is liable to pay plaintiffs said sum of $6,700."

The defendant demurred to the 1st, 2d, and 4th counts of this complaint, on the following specified grounds: "1st, because the same does not show that any insurance was ever made by defendant; 2d, because an action at law cannot be maintained on an agreement to insure merely; and, 3d, because an action at law will not lie on an agreement to insure, in the form stated, and upon the allegations made." The court below overruled the demurrer.

On the trial, as appears from the bill of exceptions, the plaintiffs first offered in evidence a memorandum in the handwriting of J. S. Secor, the defendant's secretary, which was as follows:

"5250,.....7 d'ys.....1-8.....6 56
4650,.....2 " .....1-20.....2 32

9900, 3-16, to N. O.....18 56–$27 44"

The defendants objected to the admission of this memorandum, but the court admitted it, "on the plaintiffs proposing to show, by it and parol evidence, a special contract of insurance from Mobile to the city of New Orleans." The plaintiffs then proved by one Murray, who was present at an interview between said secretary and one of the plaintiffs a few days after the loss of the cotton sued for, that said plaintiff handed to the secretary a receipt for the cotton, to be signed by the latter, and paid him the money therein mentioned as the premium of insurance; "that the secretary declined to sign said receipt, but offered to fill up a policy of insurance, which plaintiff refused to accept; that plaintiff then asked said secretary, if the defendant had not insured the cotton in the warehouse for seven days, and on the dray to the wharf, and the 198 bales to New Orleans; and that the secretary replied, 'yes." The receipt mentioned by the witness was in these words: "Received, Mobile, February 13th, 1854, from McMillan & Son, $27 44, the premium

on insurance by this office of 198 bales of cotton, valued at $50 per bale, and insured thus: seven days in the shippers' press at Mobile, at 1-8 premium, on 105 bales; two days in the different presses in Mobile, at 1-20, on 93 bales; and from Mobile to New Orleans, at 3-16 premium, on 198 bales cotton, and against all losses, perils, and misfortunes." The defendant's secretary testified, "that such a memorandum, according to the usage and custom in Mobile, if handed by the secretary of an insurance company to an *insurer*, would indicate that the contract had been entered on the books of the company, as an insurance to the city of New Orleans; and that the companies would so pay the losses." "The defendant then renewed the objection to the admission of said memorandum, and also objected to the testimony of this witness; and moved the court to exclude the whole of said evidence from the jury, on the ground that the same was illegal, and that it was not competent by parol evidence to establish a contract of insurance against defendant, but that said contract must be evidenced by an instrument in writing." The court overruled the objection, and the defendant excepted.

Said Secor, who was shown to be the defendant's secretary and general agent in making contracts of insurance, was introduced as a witness by the defendant, and testified, that the plaintiffs were in the habit of insuring with the defendant, and, at the time of the loss here in controversy, as well as for several years previously, had an open policy with defendant; that the plaintiffs made application to him, for the insurance of this cotton, verbally, and in the usual manner, without mention of any special risk; and that he thereupon made an entry on the defendant's books, in these words: "Friday, January 27th, 1854, McMillan & Son, *Helen*, to New Orleans, 198 B. cotton, 9,900, 3-16, 18.56;" and that he would have endorsed this entry on the plaintiffs' policy, if the same had been handed to him. The defendant asked this witness, "what he meant by the word 'New Orleans,' as it stood in the said entry." The plaintiffs objected to this question, and the court would not let it be put; to which the defendant excepted. The defendant also proposed to ask this wit-

ness, "whether or not he would, as such agent, have charged an additional rate of premium to cover the cotton to the city, over and above what was charged, if the question had been put to him at the time." The court would not let this question be asked, and the defendant excepted.

The plaintiffs were allowed to prove, against the defendant's objection, "that Rugely, Blair & Co., the consignees of the cotton in New Orleans, had a general policy of insurance that would have covered this cotton from the time of its reaching the city of New Orleans, although they did not offer to prove that the defendant knew of the existence of this policy;" to which ruling of the court the defendant excepted.

The court also allowed the plaintiffs to prove, "that they were in the grocery and western-produce business." The defendant objected to this evidence, on the ground of irrelevancy, and excepted to the overruling of the objection.

The evidence set out in the bill of exceptions, relative to the meaning which, by custom and usage, was attached to the words "port of New Orleans," when used in a policy of insurance, requires no special notice.

The court charged the jury as follows: "The plaintiffs claim to recover of the defendant as insurer of certain cotton which they shipped to the city of New Orleans. The plaintiffs allege, that there was a special contract of insurance by a certain steamboat; while the defendant, on the other hand, insists that it was an insurance under the open policy book, which is in evidence before you; and that, under the contract, no loss for which it is liable has occurred. The circumstances are very fully before you, from which it appears that there was certain cotton insured in warehouse in Mobile, then on the steamboat *Helen;* and that after it reached the wharf at Lake Pontchartrain, and while the steamboat *Helen* was discharging cotton, the steamboat *Georgia* came up on fire, and some of the said cotton was burnt. The first question is, what were the precise facts; and as to this, it is for you only to determine. Then, what was the contract? was it to

insure to the city of New Orleans? If so, then the defendant is liable. If there was not a special contract, was the open policy the contract? If you believe it was, and that, according to the understanding and usage, the port of New Orleans is at the city end of the railroad, then the plaintiffs are entitled to recover; but, if you believe that, according to the custom and usage, the port of New Orleans was at the lake end of the railroad, then, if the cotton was safely landed, the defendant is not liable. The mere fact of cotton being thrown out does not make a safe landing: the connection of the hands and officers of the steamboat, so far as the landing it from the boat, must have ceased. It is necessary that the landing should be made at the usual place, and in the usual manner. If you believe it was so made, this relieves the defendant; but mere throwing out the cotton, as (for instance) where water would wet it, or where it would be in peril, does not make a safe landing. Much has been said in the case about custom. Custom, or usage, cannot vary the law, but may be referred to to ascertain the meaning and intention of parties engaged in the business in which the custom is shown to exist. The usage and understanding must be of such a general and uniform character, that all persons engaged in the particular business either do or ought to know of its existence, to make it a custom. Sometimes there may be negative evidence tending to establish a custom. It is insisted, that it is at least doubtful whether the particular risk over the railroad has ever been in terms specified before this loss occurred. If it was the uniform usage and understanding among persons engaged in the business to treat the risk over the railroad as covered by the usual policies, that would be strong evidence of what was considered and meant in a policy by the term 'to the port of New Orleans.' If, however, you believe that it was mere indifference or carelessness, it would be but a small circumstance. The definition of the term 'port,' is a matter of mercantile understanding. It is for you to determine what is the mercantile sense of the term, 'port of New Orleans.' If you believe the contract is under the open policy, and no custom or

understanding is shown, the defendant is entitled to recover."

The defendant excepted to this charge, and then asked the court to instruct the jury as follows:

"1. That even if plaintiffs had made a special contract, by which defendant agreed to cover the cotton by insurance on the wharf and railroad until it reached New Orleans, it would be necessary for them to show that they were the owners, or interested in the cotton, and the nature and extent of that interest.

"2. That even if the contract had been simply for insurance from Mobile to New Orleans by the steamboat *Helen*, the law applicable to the case in that event would be, that the insurance was upon the goods shipped on board of the boat until safely landed at the usual place of unloading in the course of that trade.

"3. That if the jury believed that the insurance was effected without any special agreement at the time, the risk would be extended no further than was usual with the company: that to ascertain the risk taken, the usual policy of the company is to be looked to.

"4. That the jury, in order to ascertain what was the contract agreed upon, are to look at all the evidence before them on the subject; and if they believe from the evidence that the contract was such as was at the time expected or intended to be endorsed on the plaintiffs' open policy, then both parties are bound by it as an agreement to enter the contract on the policy."

The court gave the last two charges asked, but refused to give the second, and also refused to give the first except with this qualification: "But the fact of the plaintiffs' having possession of the cotton, at the time of making such a contract with the defendant, would be sufficient to entitle them to recover in this action:" and to the refusal of these charges the defendant excepted.

The court further charged the jury, at the request of the plaintiffs, "that when the terms of an insurance are agreed on, and entered by the company on its books, and a loss occurs before the actual execution of a policy, such entry is evidence against the company of the terms of

the contract;" to which charge, also, the defendant excepted.

The overruling of the demurrer to the complaint, the rulings of the court on the evidence, the charges given to the jury, and the refusal of the several charges asked, are now assigned as error.

P. HAMILTON, for appellant.

R. H. SMITH, *contra.*

RICE, C. J.—Conceding that many commercial codes expressly require the contract of insurance to be in writing, it is certain that the common law makes no such requisition.—1 Phillips on Ins. 8; 1 Duer on Ins. 60. It is also certain, that there is no statutory provision of force in this State, which requires an agreement entered into in this State, to insure against loss *by fire*, to be reduced to writing. In the absence of any such statutory provision, the question whether such an agreement is valid must be determined by the common law.—The State v. Cawood, 2 Stew. R. 360; Pierson v. State, 12 Ala. R. 149; Harkness v. Sears, 26 Ala. R. 493; Van Ness v. Packard, 2 Peters, 137; Sandford v. The Trust Fire Ins. Co., 11 Paige, 547; Manuscript Opinion of Curtis, J., in The Union Mutual Ins. Co. v. The Commercial Mutual Insurance Co., decided in the Federal court for Massachusetts. That law does not require it to be in writing. It amounts to nothing to say that, by the law merchant, the insurance must be effected by a written instrument, called a policy; for, (as is well said by Judge Curtis in his opinion above cited,) by the law merchant, a foreign bill of exchange must be in writing; yet there can be no doubt, that an action will lie on an oral promise, for a valuable consideration, to deliver one in payment for money lent. So a bond must be in writing, and under seal; yet a contract to deliver a bond is not required by the common law to be in writing. So a verbal promise to convey a specified tract of land, is a promise to perform what can only be done by a written instrument; yet such a promise, if made for valuable consideration, was bind-

ing under the common law; and before the statute of frauds, its performance would have been enforced, or its non-performance redressed.—Thompson v. Thompson, 4 B. Monroe, 504; Gilmore v. Shuter, 2 Mod. 310, cited with approbation in Hoffman v. Hoffman, 26 Ala. R. 535; Donaldson's Adm'r v. Rogers' Adm'r, 30 Ala. R. 175; Bixley v. The Franklin Ins. Co., 8 Pick. R. 86; Tayloe v. Merch. Fire Ins. Co., 9 How. (U. S.) 405.

Our opinion is, that an oral agreement, upon sufficient consideration, for insurance against loss on goods *by fire*, between two local points specified in the agreement as the limits or *termini* of the risk, entered into in this State, between a party having an insurable interest in them and another, is valid.—Hamilton v. Lycoming Mutual Ins. Co., 5 Penn. State R. (by Barr,) 339; Lightbody v. North Am. Ins. Co., 23 Wend. R. 18; 1 Phil. on Ins. 8 to 13; 1 Duer on Ins. 60. The reason given by English judges, why such an agreement is not valid in England, is, that by their stamp act it is unavailable as a contract without a stamp. That reason shows that it ought to be held valid here, where we have no such act.—1 Arnould on Ins. 49, 50; 1 Phil. on Ins. 11; Mead v. Davidson, 3 Adolph. & Ellis, 303; Marsden v. East, 3 East, 572.

2. We are also of opinion, that an oral agreement, upon sufficient consideration, for insurance against loss on goods *by fire*, and also against loss on them by perils or risks coming within the provisions of our statute of frauds, between two local points specified in the agreement as *the termini* of the risk, entered into in this State, between a party having an insurable interest in them and another, is valid so far as it relates to the loss *by fire*. Such a contract is divisible. A promise to indemnify against loss by fire is separable from a promise to indemnify against loss by the default or miscarriage of another. There is nothing illegal in the consideration, and nothing illegal in any of the promises; and, therefore, although the promises to indemnify against loss by the default or miscarriage of another may be void, their invalidity does not taint or affect the promise to indemnify against loss by fire.—Chitty on Con. 573, 597; Addison on Con. 147.

3. As such an agreement is valid, it clearly confers on the party having an insurable interest in the goods *a legal right;* ahd the legal right derived from it may, *after the loss by fire has occurred*, be asserted and enforced by an action at law.—See 23 Wend. R. 18, *supra;* 5 Penn. State Rep. (by Barr,) 339, *supra;* Tayloe v. Merch. Fire Ins. Co., 9 How. Rep. 405.

4. In declaring on such agreement, it is not necessary to state or enumerate all the perils embraced by the agreement, when the complaint shows that the loss is plainly attributable to only one of those perils, and sufficiently sets forth that peril.—Cotterill v. Cuff, 4 Taunton, 286; 2 Chitty's Pl. (ed. of 1844,) 179, note (y.)

Upon the principles above stated, we hold, that there was no error in overruling the demurrers to the first, second, and fourth counts of the complaint.

There is nothing in the record, which makes it necessary for us now to decide, whether any of the perils embraced by the agreement of the parties comes within the provisions of our statute of frauds; and we therefore leave that question open.—See Smith on Con. (56 Law Library,) 48; Eastwood v. Kenyon, 11 Adolph. & Ellis, 438; Hargreaves v. Parsons, 13 Mees. & Welsby, 561; Johnson v. Gilbert, 4 Hill (N. Y.) Rep. 178; Draughan v. Bunting, 9 Iredell, 10.

5. Oral evidence, in aid of insufficient written evidence of a contract, is certainly admissible, when the contract is not by any statute required to be in writing. A writing drawn up after a contract is concluded by parol, which is meant merely as a memorandum of the transaction, and which does not amount to a contract, may be given in evidence, concurrently with oral proof of the additional facts and circumstances necessary to constitute a contract and give effect to the transaction.—Addison on Con. 843, 1071–73; McCotter v. Hooker, 4 Selden's Rep. 497; Allen v. Pink, 4 Mees. & Welsby, 140; Eden v. Blake, 13 *ib.* 614; Renter v. Electric Telegraph Co., 6 Ell. & Bl. 341; S. C., American Law Register, for July, 1857, p. 566; Humphrey v. Dale, in the Court of Queen's Bench, Jan'y, 1857, reported in American Law Register, for July, 1857, p. 551, and in

26 L. J. Rep. 137, Q. B.; Lockhard v. Avery, 8 Ala. 503; Sanders v. Stokes, at January term, 1857, of this court; Twidy v. Saunderson, 9 Iredell, 5.

6. Except in matters of science and skill, and some other special cases resting upon peculiar circumstances, the understanding and opinion of a witness is not to be received as evidence. In cases not falling within the exceptions, he cannot be allowed to testify to the import of a word used in a contract. If he could, a party might be rendered accountable for the misunderstanding of the witness, contrary to the legal obligation of the contract; and the right to construe the words of the contract would be taken away from the court and the jury, and conferred upon the witness.—Gibson v. Williams, 4 Wendell, 320; Robinson v. Drummond, 24 Ala. R. 174; Whetstone v. The Bank at Montgomery, 9 *ib.* 875.

7. "A contract which the parties intended to make, but did not make, cannot be set up in the place of the one which they did make, but did not intend to make." 2 Parsons on Con. 9; Sanford v. Howard, 29 Ala. R. 684. If the insurance company, by its general agent, made a contract to insure the plaintiff's cotton to the city of New Orleans, for a certain specified premium, the contract cannot be impaired or affected by the testimony of the agent, to the effect that *he would, as such agent, have charged* on additional rate of premium to cover the cotton to the city, *if the question had been put to him* at the time the contract was made. Such testimony tends to show what influence the particular question, if it had been put, would have had upon the agent. But it is wholly immaterial in this case, how the agent would have been influenced by the question, which it is conceded on all hands was not put to him. "Such evidence leads to nothing satisfactory, and ought, on that ground, (if on no other,) to be rejected." The material inquiry in this case seems to be, not what the agent would have done if a certain question, which was not put, had been put; but what contract, if any, the agent did actually make with the plaintiff. Campbell v. Rickards, 5 Barn. & Ad. 840, and authorities cited *supra.*

8. The evidence that the plaintiffs were in the grocery and western-produce business, was admissible.—Melhuish v. Collier, 15 Ad. & Ellis, N. S. 878; Rutherford v. McIvor, 21 Ala. R. 750; Watkins v. Gaston, 17 *ib.* 662; Mobley v. Bilberry, *ib.* 428; Havis v. Taylor, 13 *ib.* 324. But a majority of the court think, there was error in allowing the plaintiffs to prove that Rugely, Blair & Co., the persons to whom the plaintiffs had consigned their cotton in New Orleans, had a general policy, which would cover the cotton from the time of its reaching that city.

As that error must work a reversal, we will merely say that it is the only error we find in the record, and proceed to lay down one proposition which may be necessary to guide the court below on another trial. It is this: If the contract was simply for insurance from Mobile to New Orleans by the steamboat *Helen*, the law applicable to the case in that event is, that the risk commenced when the goods were put on board the boat, and continued until they reached the usual place in New Orleans for delivering them in the course of that trade; unless it is proved that, according to the custom and usage of underwriters and persons concerned in the insurance business at the place where the contract was made, at the time it was made, the word New Orleans, when used in such a contract, was understood to mean, and did mean, the usual place of unloading the boat in the cause of that trade.—See Smith & Holt v. The Mobile Nav. and Mut. Ins. Co., at January term, 1857, and the authorities here cited for appellees.—1 J. Duer, 185; Parr v. Anderson, 6 East, 207; Mallan v. May, 13 M. & W. 511; see also the notes to Wigglesworth v. Dallison, 1 Smith's Leading Cases, 677–681; Smith's Mercantile Law, 325.

For the single error above pointed out, the judgment must be reversed, and the cause remanded.

SHOTWELL & CO. *vs.* GILKEY'S ADM'RS.

[ASSUMPSIT UNDER CODE ON SPECIAL CONTRACT.]

1. *How to take advantage of misjoinder of counts.*—A misjoinder of counts in the original and amended complaint cannot be reached by a demurrer to the amended complaint.
2. *Who may sue on promise to one for benefit of another.*—When a promise is made to one person, for the benefit of another, either one of them may maintain an action for its breach.
3. *Who is proper party plaintiff as person really interssted.*—Where a debtor places notes and other choses in action in the hands of another person for collection, the proceeds to be paid over to his creditors, the debtor himself may maintain an action at law for a breach of the contract.

APPEAL from the Circuit Court of Pickens.
Tried before the Hon. JOHN E. MOORE.

THIS action was brought by the appellants, as partners, against the administrators of William M. Gilkey, deceased, as one of the partners in the late firm of Gilkey & Davis. The original complaint was, in substance, as follows: "The plaintiffs claim of the defendants, as administrators as aforesaid, the sum of $108 10, due on a bill of exchange which was drawn by one John Young, on the —— of ———, for that amount, upon the late firm of Davis & Gilkey, (one of whom was defendants' intestate,) and accepted by them, payable to J. L. Shotwell, on the 15th April, 1849;" also, "the sum of $88 22, due on a bill of exchange drawn by one A. S. Horton, on the —— day of ———, for that amount, on the firm of Davis & Gilkey, and accepted by them, payable to J. L. Shotwell & Co., on the 10th March, 1849;" also, "the sum of $100, due on a bill of exchange drawn by one Joel Glass, on the —— day of ———, for that amount, on the firm of Davis & Gilkey, and accepted by them, payable to J. L. Shotwell & Co., on the 15th March, 1849;" also, "the sum of $40 52, due on a bill of exchange drawn by one S. R. Simmons, on the —— day of ———, for that amount, on the late firm of Davis & Gilkey, and accepted by them,

payable to J. L. Shotwell & Co., on the 15th March, 1849;" also, "the sum of $138 88, due on a bill of exchange drawn by one T. G. Sheppard, on the —— day of ———, for that amount, on the late firm of Davis & Gilkey, and accepted by them, payable to J. L. Shotwell & Co., on the 1st March, 1849; all of which said bills of exchange, with the interest thereon, are now due and unpaid. The plaintiffs also claim of the defendants $132 76, for so much money had and received from the said plaintiffs, to the use of said *defendants*, before the 30th March, 1847;" also, "the sum of $608 48, for money had and received from the plaintiffs, to the use of said Davis & Gilkey, before the 1st May, 1849;" also, "the sum of $608 48, on an account stated between plaintiffs and defendants' intestate, as a member of said firm of Davis & Gilkey, on the 7th June, 1849; all of which sums of money, with the interest thereon, are now due and unpaid."

An amended complaint was afterwards filed, by leave of the court, which was in these words:

"The plaintiffs, late partners, &c., as aforesaid, claim of the defendants, administrators as aforesaid, the sum of $608 48, with interest thereon, for this: On (to-wit) the 24th November, 1848, the plaintiffs, under the firm and style of J. L. Shotwell & Co., were indebted to a certain mercantile firm of Coffin & Griggs, in the sum of $590 57, by promissory note, dated Mobile, March 27, 1847, payable twelve months after date to said Coffin & Griggs, negotiable and payable at the Bank of Mobile; and, being so indebted, plaintiffs delivered to defendants' intestate, said William M. Gilkey, on the 24th November, 1848, certain claims, commonly called drafts, then in the possession of and belonging to plaintiffs, that is to say:" (describing the drafts as in the original complaint, and adding "one other note for $68 65, made by Mrs. Lucy Howard, and payable at the office of said Davis & Gilkey, March 1st, 1849;") "and defendants' intestate then and there received said claims, and promised to collect and apply the same to the payment of plaintiffs' said note to said Coffin & Griggs. And plaintiffs aver, that said

Gilkey, of the firm of Davis & Gilkey, was and is defendants' intestate, and was liable to pay said drafts as they respectively became due, and then and there promised plaintiffs to pay the same at maturity, and, on said 24th November, 1848, the day he received said drafts, promised plaintiffs to collect and apply the same to the payment of plaintiffs' said note to Coffin & Griggs. And plaintiffs further aver, that John H. Glass and Mrs. Lucy Howard were solvent and able to pay said notes on them respectively; that defendants' intestate, when he received the same, promised plaintiffs to collect the same, and to apply the money to the payment of said note to Coffin & Griggs; that said intestate, for collecting said claims, and applying the same as aforesaid, was to receive a reasonable reward, to be paid to him by said plaintiffs, and his said promises were made in consideration of said reasonable reward, which plaintiffs promised to pay him at the time his said promises were made; that said intestate, at the time said drafts became due, received the money on the same, and also received the money on said notes; yet said intestate, not regarding his said promises, did not apply said money to the payment of said note to Coffin & Griggs, nor did he ever pay the same to plaintiffs, nor have said defendants, as his administrators, since his death applied said money to the payment of said note, nor paid the same to plaintiffs, although often requested by plaintiffs so to do," &c.

The defendants demurred to the amended complaint, "in short by consent," on the following grounds: "1st, because the complaint shows the right of action to be in Coffin & Griggs, and not in the plaintiffs: 2d, because the complaint is double, and shows a misjoinder of causes of action; and, 3d, because said amended complaint discloses a cause of action requiring the assignment of a special breach, which cannot be united with any of the causes of action in the original complaint." The court sustained the demurrer, and, on the plaintiffs' declining to amend, rendered judgment for the defendants; and its ruling is now assigned as error.

H. S. SHELTON, and E. W. PECK, for appellants.

T. REAVIS, and S. F. HALE, *contra.*

WALKER, J.—The question which was chiefly argued before us was, whether or not there was a misjoinder of counts. It was contended, that the amended complaint sets forth a contract requiring the averment of a special breach, while the original complaint set forth a contract which only required the assignment of a general breach; and that, therefore, there was a misjoinder of causes of action, under section 2235 of the Code. The last complaint in the case is entitled an amended complaint, and not an amendment to the original complaint. We, therefore, consider it to be meant by the term "amended complaint" in the pleading. The demurrer was only to the amended complaint, which contains but one count. If it were conceded that the original complaint was not waived, a demurrer to the entire declaration would have been the only means of raising the question of a misjoinder of counts.—Kent v. Long, 8 Ala. 44; Chandler v. Holloway, 4 Porter, 17; Jefford v. Ringgold, 6 Ala. 544; 1 Chitty on Pleading, 205–206. The demurrer in this case, applying only to the amended complaint, would not present the question of misjoinder of counts, and should, as to the assignment of such misjoinder as a ground of demurrer to the amended complaint, have been overruled.

2. Where one, for a sufficient consideration moving from another indebted to a third person, promises him so indebted to pay his creditor, a failure to comply with the contract gives a right of action, either to the promisee, or to the person for whose benefit the promise was made. The law was so settled by us, at the last term, in the case of Mason v. Hall, upon the clearest and most satisfactory authorities.

3. The amended complaint does not aver an assignment of the choses in action therein described, to the defendants' intestate as a trustee, the assent to which by the plaintiffs' creditors, being the beneficiaries, would be presumed. To constitute such an assignment a conveyance,

a transfer of the title would be necessary. There was, upon the facts averred, no conveyance or transfer of title. There was a mere contract to collect certain debts, placed in the hands of the defendants' intestate, and to pay over the money to the creditors of the plaintiff. By the breach of this contract, the plaintiff has been injured, and has a right of action.

The court erred, in sustaining the demurrer to the amended complaint; and for that reason, the judgment of the court below is reversed, and the cause remanded.

CROW AND WIFE *vs.* BLAKEY'S EXECUTOR.

[APPLICATION FOR PROBATE OF WILL.]

1. *Withdrawal of application for probate.*—Where a will is propounded for probate, and contested by one of the heirs-at-law and distributees, the court may allow the proponent, on the day set for the hearing, to withdraw his application.

APPEAL from the Probate Court of Bibb.

IN the matter of the last will and testament of Joseph A. Blakey, deceased, which was propounded for probate by Henly G. Sneed, one of the executors therein named, and contested by the appellants. On the day appointed for the trial of the contest, the court allowed the proponent to dismiss his application; to which the contestants excepted, and which they now assign as error.

I. W. GARROTT, for the appellants.
J. R. JOHN, *contra.*

STONE, J.—In Roberts v. Trawick, 13 Ala. 68, this court held, that in a contest in the probate court on the validity of a will, the proponent had not the right to suffer

a nonsuit, under the act of the 4th February, 1846, with a view to submitting a motion in this court to set that nonsuit aside.

We subsequently held, that after a will had been propounded, and an issue made up to try its validity, the probate court committed no error in refusing to allow the proponent to withdraw from the contest, and become a witness in favor of the will. Even where there were two proponents, and the probate judge refused to permit one to withdraw and testify,—the other offering to deposit a sum of money sufficient to cover the costs,—we held his ruling free from error.—Gilbert v. Gilbert, 22 Ala. 529; Deslonde & James v. Darrington, 29 Ala. 92.

In the case last cited, we said: "Though the probate of a will is a proceeding *in rem*, yet, under our system, when there is a contest, it partakes somewhat of the nature of a proceeding *inter partes*, or *in personam*. The sections of the Code * * * assimilate it, in many respects, to ordinary suits at law." In another place we said, "If his testimony was desired on the trial, he should not have been made a party plaintiff on the record."

Neither of the cases above cited raises the precise question which is presented on this record. In this case, there was no motion for a nonsuit, with a view to a revision in this court; neither was there a motion to permit the proponent to withdraw, leaving the contest still pending, that such proponent might be offered as a witness in the very proceeding which he had set on foot. The motion in this case, which was granted by the probate judge, was for leave to dismiss the proceedings. What motive prompted the motion, we are not informed. Under the rule which we have declared in Deslonde & James v. Darrington, *supra* —viz., that the proponent and contestant become the *parties* plaintiff and defendant—we think the action of the probate court, in permitting the proponent to dismiss his proceedings, can furnish no ground of reversal in this court.

The judgment of the probate court is affirmed.

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